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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

THE STATE OF COLORADO,
Petitioner,
vs.
LESLIE BENJAMIN LaFRANKIE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Colorado
Case No. 92SA476

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QUESTION PRESENTED FOR REVIEW

Whether it is appropriate to determine "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966) by inquiring whether a reasonable person would believe "that he is deprived of his freedom of action in any significant way," and "not free to leave," but without consideration of whether there were restraints imposed by police "of the degree associated with formal arrest" under *Beheler v. California*, 463 U.S. 1121 (1983), *Minnesota v. Murphy*, 465 U.S. 420 (1984), and *Berkemer v. McCarty*, 468 U.S. 420 (1984)?

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OPINIONS BELOW

The motion to suppress is Appendix A. The transcript of the trial court's ruling is Appendix B. The Colorado Supreme Court opinion, which has been reported at 858 P.2d 702, is Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

This petition involves an interlocutory appeal by the prosecution of an order suppressing statements made by the respondent to police. On October 4, 1993, the Colorado Supreme Court affirmed the trial court's order and issued its mandate. No

petition for rehearing is permitted in such cases under Colorado appellate rules. Colo. R. App. P. 4.1(g).

CONSTITUTIONAL AND RULE PROVISIONS

Amendment V of the United States Constitution provides in pertinent part: "No person ... shall be compelled, in any criminal case, to be a witness against himself...."

Amendment XIV, § 1 of the United States Constitution provides, in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE FACTS

The respondent LaFrankie was employed by Hi-Tech Manufacturing. A computer had been stolen from Hi-Tech. The employer suspected LaFrankie because he had access to the computer and because of certain statements he made and suspicious actions he took after the theft. The employer reported the theft and the suspicions to police. Two detectives went to LaFrankie's place of employment to investigate.

A company administrator brought LaFrankie from his work place to the administrative area, where the detectives asked him if "he had a few minutes to talk to us" about the theft. LaFrankie agreed to talk to them, saying that he wanted to get the matter straightened out. The detectives questioned him in the president's office. LaFrankie first denied having taken the computer. He said, however, that he had recently bought a computer at a garage sale, and he feared that it might be the stolen computer. The detectives emphatically told him several times that they did not believe his story and urged him to tell the truth. They told him that even if he confessed he would not be taken into custody, but that his case would be referred to the District

Attorney for issuance of a felony summons. After about thirty minutes, he admitted the theft. LaFrankie then took the detectives to his home and turned over the stolen computer. He was not arrested; rather, over a month later, a summons was issued ordering him to appear in court.

STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTION WAS RAISED

The Respondent filed a motion to suppress statements and evidence in the trial court, alleging that "the circumstances created a de facto custody situation," so that "the requirements of the *Miranda* decision and its progeny apply." Pet. App. at A-2. The trial court, relying on *Miranda v. Arizona*, 384 U.S. 436 (1966) and not independent state grounds, found the interrogation to be custodial and suppressed Mr. LaFrankie's statements because of the absence of *Miranda* warnings, explaining that:

> ... since the purpose of the interview was to get the defendant to confess, that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise *Miranda* doesn't mean anything.

Pet. App. at B-3.

After finding the setting to be custodial based on the circumstances of the interview, the court analyzed those same circumstances and found that the statements were voluntary because the officers were truthful, no overt threats or promises were made, the style of the questioners was low key and not calculated to overbear the defendant's will, and the defendant was sufficiently

sophisticated and experienced. Pet. App. at B-4, B-5.

THE DECISION OF THE COLORADO SUPREME COURT

On appeal, the Colorado Supreme Court affirmed the suppression order of the trial court. Although it found the trial court's statement of "what *Miranda* is about" to be "misleading,"[1] the Colorado Supreme Court nonetheless held that the trial court correctly found the setting to be custodial. The Colorado Supreme Court placed particular emphasis on the fact that LaFrankie was interviewed at his workplace, stating: "there can be few places more intimidating or potentially coercive to an individual than one's place of employment." Pet. App. at C-8 n.10. In addition to emphasizing the place of the interview, the Supreme Court found the 15' by 15' size of the room where the interview was conducted, the presence of only the two detectives in the room, the purpose, length, and accusatory nature of the interview, the fact that respondent was not informed he was free to leave, and the fact that his statements were not "volunteered," Pet. App. at C-8, C-9, supported the trial court's conclusion that the respondent was in custody "because the defendant was interviewed by the police for the purpose of obtaining a confession and because the defendant reasonably believed he was not free to leave." Pet. App. at C-2. The Supreme Court began its analysis of this determination of custody by emphasizing that "Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the person interrogated 'has been significantly deprived of his freedom of action.'" Pet. App. at C-5.

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[1] The Court correctly observed that *Miranda* advisements are not required "anytime a police officer's actions are motivated by a desire to obtain a confession or other information from a suspect;" however, the Court also said in this context that "the purpose of the encounter is one of the prominent factors which should be considered in determining if a reasonable person would feel deprived of his freedom of action in a significant way." Pet. App. at C-7 n.8.

REASONS TO ISSUE THE WRIT

I. INTRODUCTION

The appropriate test for the determination of "custody" for purposes of *Miranda* has been stated repeatedly by this Court: a determination of custody must be based upon formal arrest or imposition by the police of restraints of the degree associated with arrest. *Beheler v. California*, 463 U.S. 1121, 1125 (1983); *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984); and *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The Colorado Court applied a test for custody under which lesser restraints than those associated with arrest can trigger *Miranda's* requirements and which is, therefore, substantially different from and broader than the test established by this Court.

In spite of the clarity with which this Court has linked custody to the imposition of significant restraints associated with arrest, there continues to be widespread confusion in Colorado and in other jurisdictions concerning when the requirements of *Miranda* are applicable. This confusion persists because many lower courts continue to give independent meaning to the definition of "custodial interrogation" in *Miranda* -- "or otherwise deprived of his freedom in any significant way" -- instead of recognizing the clarification of that definition provided in *Beheler*, *Berkemer*, and *Murphy*. It is also the result of the failure of many lower courts to distinguish properly between more limited Fourth Amendment seizures on the one hand and arrests on the other when making determinations of custody for purposes of the Fifth Amendment.

Instead of recognizing the limitations this Court has proscribed for the application of *Miranda*, by requiring restraints associated with arrest for there to be custody, the Colorado Supreme Court analyzed "custody" to make *Miranda* applicable in a broad range of situations. Decisions from other jurisdictions demonstrate

that Colorado is not alone in its failure to appreciate the significance of this Court's refinement of the meaning of custody.

The cost to society of this inappropriately expansive approach to *Miranda* is demonstrated by this case. Reliable and voluntary admissions of criminal responsibility are kept from the fact-finder, and criminal cases often have to be dismissed, because of the suppression of the statements given under circumstances which are outside the concerns addressed in *Miranda* and its progeny. The Writ should be issued to eliminate this widespread misapplication of *Miranda* and its progeny.

II. ARGUMENT

A. The U.S. Supreme Court Has Established That Custody Requires Formal Arrest or Restraints to a Degree Associated with Formal Arrest.

This Court originally defined custodial interrogation to mean questioning "after a person has been taken into custody or otherwise deprived of his freedom in any significant way." *Miranda*, 384 U.S. at 444. Since one is usually taken into custody through arrest, this two pronged definition of custodial interrogation suggested that the requirements of *Miranda* were triggered not only by arrest, but also by other restraints on freedom which might be less significant than arrest.

Lower courts applied various approaches to determine whether one is "otherwise deprived of his freedom in any significant way." In reviewing such decisions, this Court has rejected the fact that the defendant was the "focus" or the "suspect" as the test for custody. *Oregon v. Mathiason*, 429 U.S. 492 (1977); *Beckwith v. United States*, 425 U.S. 341 (1976). This Court has likewise rejected

the idea that *Miranda* applies simply when there is a "coercive environment" emphasizing that:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Mathiason, 429 U.S. at 495.

In *Beheler*, the lower court again found, in spite of *Mathiason*, that a station house interview was custodial because of its inherently coercive environment even without any indicia of arrest. This Court reversed and linked custody to arrest by stating that in determining whether one is in custody for purposes of *Miranda*:

> [t]he ultimate inquiry is simply whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with formal arrest.

Beheler, 463 U.S. at 1125. This Court has also said:

> Under the narrower standard appropriate in the *Miranda* context, it is clear that Murphy was not "in custody" for purposes of receiving *Miranda* protection since there was no "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.

Murphy, 465 U.S. at 430.

This Court then rejected, as irrelevant, the subjective intent of the police as a basis for finding custody, *Berkemer*, 468 U.S. at 442, and again emphasized that,

> It is well settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest."

Berkemer, 468 U.S. at 440. This Court has repeatedly stated that custody requires significant restraints, which are to be measured in terms of the police domination associated with arrest.

B. The Colorado Supreme Court's Test for Custody, Like The Tests Applied in Many Other Jurisdictions, Does Not Include Whether There Are Restraints Associated With Arrest.

Neither the majority nor the dissent below cited *Beheler*, *Murphy*, or *Berkemer*, nor did either opinion state the test for custody in terms of restraints which are "to a degree associated with arrest." The Colorado Court has ignored the test articulated by this Court in numerous other cases as well.[2] Instead, the Colorado Court has

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[2] *People v. Thiret*, 685 P.2d 193 (Colo. 1984); *People v. Black*, 698 P.2d 766 (Colo. 1985); *People v. Harper*, 726 P.2d 1129 (Colo. 1986); *People v. Sandoval*, 736 P.2d 1201 (Colo. 1987); *People v. Cleburn*, 782 P.2d 784 (Colo. 1989), *cert. denied*, 495 U.S. 923 (1990); *People v. Julian Trujillo*, 784 P.2d 788 (Colo. 1990); *People v. Lupy Trujillo*, 785 P.2d 1290 (Colo. 1990); *People v. Horn*, 790 P.2d 816 (Colo. 1990); *People v. Probasco*, 795 P.2d 1330 (Colo. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 558 (1990); *People v. Gennings*, 808 P.2d 839 (Colo. 1991); *People v. Hamilton*, 831 P.2d 1326 (Colo. 1992); *People v. Thomas*, 839 P.2d 1174 (Colo. 1992); *People in the Interest of J.C.*, 844 P.2d 1185 (Colo. 1993); *People v. Haurey*, 859 P.2d 889 (Colo. 1993).

Only in traffic cases has the Colorado Supreme Court applied the test of restraints "to a degree associated with arrest." *People v. Archuleta*,

continued to rely on the original language defining custodial interrogation in *Miranda* -- "deprived of his or her freedom of action in any significant way."

In *Berkemer*, the defendant relied heavily on this phrase from *Miranda* to support its position that roadside questioning was custodial. This Court declined "to accord talismanic power" to that phrase, *Berkemer*, 468 U.S. at 435-436, and instead emphasized that *Miranda* does not become applicable until the suspect's freedom of action is curtailed to a "degree associated with formal arrest." *Berkemer*, 468 U.S. at 440. The Colorado Court has, nonetheless, continued to give talismanic power to the language of being deprived of freedom of action "in any significant way."

The Court below said, "Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the person interrogated 'has been significantly deprived of his freedom of action.'" Pet. App. at C-5. In a like manner, in the few cases in which the Colorado Court has referred to the constraints "associated with formal arrest," it has taken that language out of context and understated its significance. The Court has said:

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719 P.2d 1091 (Colo. 1986); *People v. Wallace*, 724 P.2d 670 (Colo. 1986); and *People v. Milhollen*, 751 P.2d 43 (Colo. 1988). To apply this test only to traffic situations is to focus too narrowly on the facts, rather than the reasoning, of *Berkemer*. The test applied in *Berkemer* was also applied in *Beheler* and *Murphy*, both of which were murder cases, and this test was derived from *Beckwith*, *Mathiason*, and *Miranda* itself, none of which was a traffic case.

The Colorado Court has cited *Beheler*, *Murphy*, and *Berkemer* on occasion, but only to support the objective or case by case nature of the determination of custody. *E.g.*, *Harper*, 726 P.2d at 1131; *Julian Trujillo*, 784 P.2d at 791 n.2; *Lupy Trujillo*, 785 P.2d at 1293; *Gennings*, 808 P.2d at 845; *Hamilton*, 831 P.2d at 1330.

> A person obviously is in custody when that person is subjected to the constraints associated with a formal arrest. The *Miranda* requirements, however, are not limited to formal arrests, but also include police interrogation conducted under circumstances where the person interrogated has been significantly deprived of his freedom of action.

People v. Julian Trujillo, 784 P.2d 788, 791 (Colo. 1990). *People v. Thomas*, 839 P.2d 1174, 1178 (Colo. 1992). Where this Court has explained that custody requires formal arrest or restraints to a degree associated with formal arrest, the Colorado Court finds situations to be custodial if there are other significant, but undefined, deprivations of freedom which are to a degree less than arrest.

The Colorado Court has overlooked the significance of "restraints associated with formal arrest" as the test for custody under *Beheler*, *Murphy*, and *Berkemer*, relegating the "ultimate inquiry" for custody established by this Court to the determination of only the "obvious" examples of custody. The Colorado Court has continued to give controlling effect to the unrefined language from *Miranda*, the significance of which this Court minimized in *Berkemer*, and applies that language unconstrained by any association with arrest, thereby expanding the situations in which compliance with *Miranda* is required.

Numerous courts have recognized that *Beheler*, *Murphy*, and *Berkemer* require the determination of custody to be based on restraints to a degree associated with arrest.[3] On the other hand,

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[3] *E.g.*, *Davis v. Allsbrooks*, 778 F.2d 168, 171 (4th Cir. 1985) (*Beheler* "articulated the standards by which 'custody' is to be judged"); *United States v. Bengivenga*, 845 F.2d 593, 596 (5th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988) (describing the meaning of custody as having been refined by *Beheler*, *Berkemer*, and *Murphy*, which undermined the test previously applied in that Circuit); *Wunder v. State*, 705 P.2d 333, 334 (Wyo. 1985)

other jurisdictions have, like Colorado, overlooked the significance of this Court's decisions in *Beheler*, *Murphy*, and *Berkemer*, and have relied instead on an inappropriate emphasis of the language from the original *Miranda* decision. For example, the California Court has said that custody "occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he is so deprived." *People v. Stansbury*, 846 P.2d 756, 775-776 (Cal. 1993), *cert. granted*, *Stansbury v. California*, 114 S. Ct. 380 (1993). The California Court applied this language with particular emphasis on the four "most important considerations," to hold that, "[t]he trial court's determination that the suspicion focused on the defendant only when he mentioned that he had driven a turquoise car on the night of the crime is supported by substantial evidence." *Stansbury*, 846 P.2d at 775-776. The Court did not ask whether that fact alone or with others established the functional equivalent of arrest.

Other examples of reliance on the unrefined definition of custodial interrogation from *Miranda* include: *Wallace v. State*, 813 S.W.2d 748, 750 (Texas Crim. App. 1991) (stating "One factor used by courts is whether a reasonable person would believe his freedom was being deprived in a significant way," but emphasizing that the officer lacked probable cause to arrest, without discussing whether police imposed restraints comparable to arrest); *State v. Furlough*, 797 S.W.2d 631, 639 (Tenn. Crim. App. 1990) (emphasizing that

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(describing *Berkemer* as having "further defined the test for 'taken into custody or otherwise deprived of his freedom of action"); *State v. Harris*, 725 P.2d 975, 978 (Wash. 1986), *cert. denied*, 480 U.S. 940 (1987) (*Berkemer* "elucidated the test" for the application of *Miranda*, requiring it to modify the "probable cause to arrest" standard it had previously applied); *State v. Fritschen*, 802 P.2d 558, 563-564 (Kan. 1990) (stating that prior analysis in Kansas for custody had "developed without significant reference to any post-*Miranda* United States Supreme Court cases" and was not "entirely consistent with" those cases); *State v. Medrano*, 844 P.2d 1364, 1367 (Idaho App. 1992) (*Berkemer* "refined" the meaning of being "deprived of his freedom by the authorities in any significant way").

"[t]he investigation has focused on the defendant as the prime suspect" in applying the test of "whether she was 'deprived of her freedom of action in any significant way,'" without discussing restraints in terms of arrest); *Shiplet v. State*, 732 S.W.2d 622, 624 & 629 (Texas Crim. App. 1985) (*en banc*) (beginning the analysis with the language "otherwise deprived of his freedom of action in any significant way," then acknowledging that various factors used by different courts to apply this test involve "intermingling the focus concept that some courts use with the subjective concept that other courts use..." and then applying such factors without linking them to restraints associated with arrest).

Another court acknowledged the "ultimate inquiry" from *Beheler*, but proceeded to describe the test for that inquiry to be whether a reasonable person would have felt under arrest or "otherwise deprived of his freedom of action in any significant way." *Cobb v. Perini*, 832 F.2d 342, 346 (6th Cir. 1987), *cert. denied*, 486 U.S. 1024 (1988). Under such an approach, which is comparable to that followed in Colorado, the earlier language from *Miranda* is used to refine the later language from *Beheler*, instead of the other way around. The court in *Cobb* relied on the facts that the defendant was not told he was a suspect or charged, and that the police had no basis for charging him, rather than on whether they imposed restraints which are associated with arrest.

The critical defect in relying on this language from *Miranda* alone is that it provides no guidance for determining when the deprivation of freedom of action is "significant" enough to establish actual custody. This allows for an expansive, rather than a limited, application of *Miranda*. It was this defect which this Court first rectified in *Beckwith* and *Mathiason*, with an emphasis on actual custody, and then resolved more completely in *Beheler*, *Murphy*, and *Berkemer*, with the emphasis on restraints imposed by police to a degree associated with arrest. Many jurisdictions, including Colorado, do not apply the language from *Miranda* through the more precise meaning this Court has since given it.

C. The Colorado Supreme Court and Many Other Jurisdictions Equate Custody With Feeling "Not Free to Leave," Which is The Test For Seizures Less Restrictive Than Arrest.

The Colorado Supreme Court referred favorably to the trial court's consideration of the fact that the respondent was not told he was "free to leave" and to the trial court's conclusion that the respondent was not aware that he was "free to leave." Pet. App. at C-2, C-4, C-8 & C-10. The Colorado Court, like many others, equates custody with being "not free to leave."

The words "not free to leave" have been used to describe a prerequisite for Fourth Amendment seizures, and particularly for investigatory stops under *Terry v. Ohio*, 392 U.S. 1 (1968). *California v. Hodari D.*, __ U.S. __, 111 S. Ct. 1547, 1551 (1991); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). The Fourth Amendment issue for which this phrase is applied is the determination of whether "the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen." *Hodari D.*, 111 S. Ct. at 1550, quoting *Terry*, 392 U.S. at 19 n.16. A seizure occurs if the use of force or show of authority by police was to such an extent that one would reasonably felt "not free to leave."

The Colorado Court cited *Mendenhall* and equated all Fourth Amendment seizures in terms of being "not free to leave," and then said, "... the standards to be employed in determining the meaning of 'custody' under the Fifth Amendment for purposes of *Miranda* and 'seizure' for purposes of the Fourth Amendment are identical...." *People v. Johnson*, 671 P.2d 958, 961-962 (Colo. 1983). The Colorado Court has recently said, "The essential element of custody is that a reasonable person in the suspect's position would feel that he is not free to leave ..." *Thomas*, 839 P.2d at 1179.

Even if there is a Fourth Amendment seizure, however, it is not necessarily true that there is custody triggering *Miranda* under the Fifth Amendment. In contrasting custody to a traffic stop, which was acknowledged to be a Fourth Amendment seizure comparable to an investigatory *Terry* stop, this Court said,

> [t]he comparatively non-threatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*.

Berkemer, 468 U.S. at 440. Restraints such as *Terry* stops and traffic stops, which are Fourth Amendment seizures of a degree less than formal arrest, do not, therefore, effect custody and, for that reason, do not implicate *Miranda*.

Contrary to the premise of the Colorado Court for the determination of custody, all Fourth Amendment seizures, under which one is not free to leave, do not trigger the requirement for *Miranda* warnings. The seizure, *i.e.* the use of physical force or show of authority, must be greater than a *Terry* stop and must involve restraints to a degree associated with arrest. Yet the Colorado Court applies the test for any seizure, even those which are less restrictive than an arrest, to determine custody.

Some courts have recognized that being "not free to leave" is the test for a lesser degree of seizure, which is not significant enough to implicate *Miranda*. For example, the Fifth Circuit has said:

> We know that "a person has been 'seized' within the meaning of the Fourth Amendment only if, ... a reasonable person would have believed that he was not free to leave." But a Fourth Amendment seizure does not necessarily render a person in custody for purposes of *Miranda*.... "[T]he core meaning both of 'seizure' in the Fourth Amendment sense, and

> 'custody' in the *Miranda* sense, appears to be the same: the restraint of a person's 'freedom to walk away' from the police." The critical difference between the two concepts, however, is that custody arises only if the restraint on freedom is a certain degree -- the degree associated with formal arrest.

United States v. Bengivenga, 845 F.2d 593, 598 (5th Cir. 1988), *cert. denied*, 488 U.S. 924 (1988).[4] Being "not free to leave" may be necessary to a determination of custody, but it is not sufficient for that determination.

Numerous other jurisdictions have, like Colorado, determined

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[4] Other cases recognizing this distinction include: *Tagala v. State*, 812 P.2d 604, 608 (Alaska 1991) (referring to "not free to leave" as the basis for custody, but stating that "a temporary stop cannot be equated with a formal arrest, even when considerable force is used in effectuating the stop."); *United States v. Carter*, 884 F.2d 368, 379 (8th Cir. 1989) ("The test is not merely whether Carter believed he was free to leave; rather, we must determine whether he reasonably believed that his 'freedom of action [was] curtailed to a 'degree associated with formal arrest.'"); *State v. Hall*, 537 So. 2d 171, 172 (Fla. App. 1989) (citing *Berkemer* for *Miranda* warnings being unnecessary for temporary detentions, so that a more restrictive detention and more coercive circumstances than those is *Berkemer* must be present.); *State v. Toro*, 551 A.2d 170, 172-173 (N.J. Super. 1988), *overruled on other grounds*, 574 A.2d 445, 446 (N.J. 1990) (a traffic stop does not implicate *Miranda*, nor do more substantial restrictions unless those restrictions reach a degree associated with formal arrest.); *State v. Willis*, 494 A.2d 108, 116-117 (Vt. 1985) (citing *Berkemer* for the need for "the functional equivalent of formal arrest," then requiring a determination of whether one was free to leave, but distinguishing *Terry* stops from the incommunicado, police-dominated settings or the functional equivalents of arrest.); *United States v. Streifel*, 781 F.2d 953, 960-961 (1st Cir. 1986) ("Thus, *Berkemer* indicates that, in a non-stationhouse setting, *Miranda* is *not* triggered simply because a person detained by the police has reasonable cause to believe that he is not free to leave; rather, a host of factors must be considered in order to determine whether the 'suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'")

custody based on whether a reasonable person would feel "free to leave," without acknowledging the attention this court gave to arrest in *Beheler*, *Murphy*, and *Berkemer*. *E.g.*, *State v. Torres*, 412 S.E.2d 20, 24 (N.C. 1992) ("It is well settled that the test for whether a person is 'in custody' for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave or compelled to stay."); *Tart v. Commonwealth of Massachusetts*, 949 F.2d 490, 504 (1st Cir. 1991) ("The custody determination ... focuses on whether a reasonable person in the same circumstances would believe he was not free to leave," citing *United States v. Ortega-Santana*, 869 F.2d 12, 14 (1st Cir. 1989), which is a *Terry* stop case applying *Mendenhall*); *United States v. Kirsteins*, 906 F.2d 919, 923 (2d Cir. 1990) (citing *Berkemer* for a focus on whether a reasonable person would have believed he was free to leave); *State v. Blackman*, 377 S.E.2d 290, 292 (N.C. App. 1989) ("In short, 'custody' depends upon whether a reasonable person would have believed he was free to leave the company of the police," citing *Mendenhall*); *State v. Fiocchi*, 553 A.2d 181, 186 (Conn. 1989) (citing *Mendenhall* and "not free to leave" in the context of determining custody); *United States v. Mahar*, 801 F.2d 1477, 1499-1500 (6th Cir. 1986) (determining custody based on whether one would feel "free to leave").

In addition, even other jurisdictions which have recognized the test for custody from *Beheler*, *Murphy*, and *Berkemer*, have nonetheless applied it through reference to whether one would feel "not free to leave." *E.g.*, *United States v. Mitchell*, 966 F.2d 92, 98 (2d Cir. 1992) (citing the test from *Berkemer*, then stating the inquiry under that test to involve indicators of whether the defendant was "free to leave"); *State v. Northrop*, 568 A.2d 439, 443-444 (Conn. 1990) (citing *Mendenhall* for the proposition that custody exists when a reasonable person would have believed he was not free to leave, then citing the test from *Beheler*, then reaching its holding based on the evidence that the defendant was "free to leave"); *State v. Connery*, 441 N.W.2d 651, 655 (N.D. 1989) (after quoting the test from *Berkemer*, stating that to determine whether the initial traffic

stop had escalated beyond a general investigation, "[t]he relevant inquiry is whether a reasonable person in Connery's position would have believed that he was free to leave"); *State v. Dedrick*, 564 A.2d 423, 427 (N.H. 1989), *cert. denied*, 110 S. Ct. 1305 (1990) (citing the test from *Beheler*, but emphasizing the trial court's finding that the defendant "would be justified in concluding he was not free to leave"); *United States v. Chalan*, 812 F.2d 1302, 1306-1307 (10th Cir. 1987), *cert. denied*, 488 U.S. 983 (1988) (citing *Beheler* for its elaboration on *Miranda*, but basing its holding on circumstances suggesting that the defendant was free to leave); *United States v. Phillips*, 812 F.2d 1355, 1360 (11th Cir. 1987) (citing the test from *Beheler*, then combining it with the test from *Mendenhall* by stating the inquiry to be whether the restraint could be characterized as "that 'degree associated with a formal arrest' to such extent that he would not feel free to leave"); *State v. Caruolo*, 524 A.2d 575, 579-580 (R.I. 1987) (citing the test from *Beheler*, but then applying it in terms of whether the circumstances would "suggest to a reasonable person that he was not free to leave").

It goes without saying that one who has been subjected to restraints to a degree associated with arrest is not free to leave. The problem, clearly identified in *Berkemer*, is that there are many other situations in which people may not feel or be free to leave, but which do not implicate *Miranda* because they do not involve a level of police domination associated with arrest. For there to be custody, the reason for being "not free to leave" must be police use of physical force or demonstration of authority to a degree associated with arrest.

This problem is well demonstrated here. This case involves an investigation during which police requested that the suspect answer questions about a crime and the suspect agreed to do so. The police used no words or actions which effected a formal arrest or which otherwise explicitly imposed any restrictions on the suspect's freedom of movement. The suspect made no statements indicating any desire to be free from further questioning or to leave, and therefore the police made no response which would demonstrate that they were

asserting domination contrary to such a desire. Nonetheless, the Court below found that this interrogation was custodial, in large part because it believed that a person questioned by police to confirm their suspicions about his involvement in a crime might feel he was "not free to leave."

It is only in circumstances in which police impose significant restraints that they so dominate the situation that there is the inherently coercive environment which was of concern in *Miranda*. Frequent judicial references to whether one is "not free to leave" without additional guidance do not focus the analysis on whether the police have used physical force or shown authority sufficient to impose restraints to the degree associated with arrest. This allows the determination of custody to be based on the existence of any restraints, even self-imposed ones, which might arise from the apprehension which is inherent when police question a suspect, on whom they have focused their suspicion. Yet this Court has held that such a "coercive environment" is not the equivalent of a custodial setting. *Beheler*, 463 U.S. at 1124; *Mathiason*, 429 U.S. at 495. The result of inquiring whether one in the defendant's position might reasonably feel free to leave rather than whether there are significant restraints (*i.e.* those to a degree associated with arrest) is to expand inappropriately the situations in which *Miranda* is applied.

D. Various Factors Considered by Different Courts In Determining Custody Do Not Properly Direct the Inquiry To Whether Police Have Imposed Restraints to a Degree Associated With Arrest.

Different courts have emphasized different factors as significant for the determination of custody. The Colorado Court stated below that in determining custody, the totality of the circumstances should be considered, including:

> The time, place, and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or non-verbal response to such directions.

Pet. App. at C-6.

Such a list, in the absence of a clear goal for the analysis, does not insure that the determination will in fact be consistent with the concerns of *Miranda*. For example, the Court below emphasized the place of the interview, stating, with no support in the record, that "there can be few places more intimidating or potentially coercive to an individual than one's place of employment..." Pet. App. at C-8 n.10. Even if this assertion were true, such intimidation or potential coercion is due to the relationship between the employer and the employee. It does not establish a use of force or show of authority by the **officer**, and does not, therefore, effect a seizure, much less establish custody. It was likewise improper for the Colorado Court to give prominence to the purpose of the interview as a factor strongly indicating custody, Pet. App. at C-7 n.8, because the desire to obtain a confession is a subjective state of mind, not an application of physical force or a show of authority. Pet. App. at C-15, Mullarkey, J. dissenting.

Other courts have used different lists of factors in efforts to direct the analysis for custody. Many of these factors have been found by this Court to involve inappropriate considerations, such as subjective matters, whether the defendant is a suspect, or whether the investigation has focused on the defendant. **See**, *e.g.*, *Maine v.*

Thibodeau, 475 U.S. 144, 1145 (1986) (Burger, Chief Justice, dissenting from the denial of certiorari) (emphasizing that four of the six factors applied by the Maine Court had been rejected by this Court or other courts, illustrating "an acute need for clarification of the proper factors to be considered in making the 'in custody' determination."); *Delgado v. State*, 840 S.W.2d 594, 598 (Tex. App. 1992) ("Both the United States Supreme Court and the Texas Court of Criminal Appeals still utilize the concepts of 'custody' and 'focus'..."); *Wallace*, 813 S.W.2d at 750 ("Other relevant factors are probable cause to arrest, subjective intent of the police, focus of the investigation, and subjective belief of the defendant"); *Stansbury*, 846 P.2d at 775 ("the most important considerations ... include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of the questioning."); *Furlough*, 797 S.W.2d at 639 ("(1) The nature of the interrogator. (2) The nature of the suspect. (3) The time and place of the interrogation. (4) The nature of the interrogation. (5) The progress of the investigation at the time of the investigation"); **cf.** *Wunder v. State*, 705 P.2d 333, 335 (Wyo. 1985) ("One cannot be in custody of police unless it can be fairly said that his freedom of movement has been involuntarily curtailed by force or immediate threat of force from the police").

The confusion throughout the nation on this issue is demonstrated by the situation in Missouri. In *State v. Middleton*, 854 S.W.2d 504, 513 (Mo. App. W.D. 1993), the Court said, "Missouri case law has been at loose ends because three different tests have been employed to trigger the *Miranda* warning." The court said the three tests were: (1) a "three pronged test," as applied in *State v. Sanad*, 769 S.W.2d 436, 439 (Mo. App. 1989) (*i.e.* whether there was probable cause to arrest, whether the investigation at the time of the interrogation had focused on the accused, and the subjective intent of the police officer); (2) a test based on whether there was reasonable grounds to believe that a crime was committed by the defendant; and (3) a test requiring formal arrest or arrest-like restraints.

Many of these factors, such as the purpose of the interview, the character of the interview, whether the police were accusatory, what the police knew, whether they had probable cause, or the stage of their investigation do not answer the "ultimate inquiry" of whether the police imposed restraints associated with arrest. This is because such factors: (1) do not address whether police acted on what they knew or thought by applying physical force or obtaining submission to their assertion of authority as required for an arrest, see *Hodari D.*, 111 S. Ct. at 1551; (2) involve subjective information in conflict with *Berkemer*, 468 U.S. at 442; or (3) relate to whether the defendant is a suspect upon whom the police have focused in conflict with *Beckwith*, 425 U.S. at 347 and *Mathiason*, 429 U.S. at 495. In addition, many of these factors are inappropriate because (4) police do not have to take a suspect into custody, and have not necessarily done so, just because they have enough information to make an arrest. See *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

E. The Determination of Custody for Purposes of Miranda Is an Issue of Paramount Importance Nationally.

The various tests and considerations for custody do not provide a consistent and appropriate frame of reference for this fundamental matter of Fifth Amendment doctrine. No list of factors will lead to proper results in jurisdictions which, like Colorado, have not clearly acknowledged that the goal of the evaluation of the circumstances is to determine whether police imposed restraints "of a degree associated with arrest." No list of factors will properly confine the analysis, as contemplated by *Miranda* and its progeny, unless it is consciously developed and applied to identify custody in terms of restraints associated with arrest, and not in more general terms. Such tests for custody do not provide the police the guidance they need to determine at the time of the investigation that the circumstances are custodial, so that they can do their difficult work effectively.

In *Miranda* itself, this Court emphasized that the essential custodial setting was that in which there was "incommunicado interrogation of individuals in a police dominated atmosphere." *Miranda*, 384 U.S. at 445. This Court explained that it was this atmosphere which involved "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. This Court has since emphasized that it is such settings, in which the police have isolated and dominated the suspect, for which the *Miranda* warnings were designed and to which they were limited. *Beckwith*, 425 U.S. at 345-347; *Mathiason*, 429 U.S. at 495. This Court has established that such police domination required "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125; *Murphy*, 465 U.S. at 430; *Berkemer*, 468 U.S. at 440.

The wide variety of tests and factors which different courts have adopted for the determination of custody, and the results derived from the application of those tests and factors, demonstrate that many courts still do not recognize *Miranda's* "own explicitly stated rationale" *Beckwith*, 425 U.S. at 345, *i.e.* that it is only police dominated environments "to which *Miranda* by its terms was made applicable, and to which it is limited." *Mathiason*, 429 U.S. at 495. As demonstrated by this case, the Colorado courts find custody under circumstances which do not involve the degree of restraints required by this Court for there to be custody, so that inculpatory statements are often suppressed inappropriately. Such an expansive approach to defining when interrogation is custodial "ignores both *Miranda's* mission and its only source of legitimacy" and interferes unnecessarily with "the need for police questioning as a tool for effective enforcement of criminal laws" by suppressing admissions of guilt made in a wide variety of circumstances having little resemblance to actual custody, even though such admissions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 425-426 (1986).

This Court has recently granted a defendant's petition for writ of certiorari to address a related *Miranda* issue involving the determination of custody. *Stansbury v. California*, No. 93-5770, *cert. granted* (U.S. Nov. 1, 1993). The different approaches taken by the California Supreme Court and the Colorado Supreme Court demonstrate the confusion nationally with regard to the determination of custody. *Stansbury* presents the more narrow issue of whether subjective considerations, involving when police suspicion has focused on the defendant so that he was considered a suspect and not a witness, were an inappropriate basis for the determination of custody. This case raises the broader and more general issue of the relationship of restraints associated with arrest to the definition of custodial interrogation. That case and this one both involve custody, but under very different fact situations and very different legal standards. This case is, therefore, a very effective complement to *Stansbury*. Consideration of both of these cases would allow for much more comprehensive attention to, and resolution of, this important issue.

CONCLUSION

The Colorado Court erred in its determination of custody in at least three ways. It gave "talismanic effect" to the second phrase from the definition of custodial interrogation in the original *Miranda* decision. It ignored this Court's repeated references, since *Miranda*, to arrest to describe the significant degree of restraints which are necessary to trigger the *Miranda* requirements. And it emphasized feeling "not free to leave" as the "essential" element for custody, even though that is the test for lesser seizures than arrests, which this Court has said do not implicate *Miranda* at all.

Based on similarly inappropriate analysis, courts across the country have been inconsistent with each other and with the decisions of this Court in their approaches to custody for purposes of *Miranda*. The Colorado Court and many others have not recognized that *Miranda* was concerned with those settings in which police have

imposed restraints which are to the degree associated with arrest, thereby isolating and dominating the person they interrogate. Within these jurisdictions, compliance with *Miranda* is often required under a much wider range of circumstances than concerned the *Miranda* Court itself, with the result that many reliable admissions are inappropriately kept from the fact-finder.

It is respectfully requested that this Court grant this petition and review the holding of the Colorado Supreme Court to eliminate this widespread confusion in the application of *Miranda*.

Respectfully Submitted,

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APPENDIX A

DISTRICT COURT, BOULDER COUNTY, COLORADO

Case No. 92CR601-4

MOTION TO SUPPRESS STATEMENTS AND EVIDENCE

PEOPLE OF THE STATE OF COLORADO, Plaintiff

v.

LESLIE LAFRANKIE, Defendant

Mr. LaFrankie moves to suppress any and all evidence and statements alleged to have been made by Mr. LaFrankie relating to crimes charged herein on grounds that said evidence and statements were involuntary, in violation of Mr. LaFrankie's right to the assistance of counsel, the product of an illegal arrest or illegal search and seizure, in violation of Rule 5 of the Colorado Rules of Criminal Procedure, without adequate warning of rights, without valid waiver of rights, and were otherwise obtained in violation of Mr. LaFrankie's rights under the Colorado Rules of Criminal Procedure and Statutes and Constitutions of the United States and the State of Colorado. This motion is based on the following:

1. On April 10, 1992, Mr. LaFrankie was interviewed by Detectives Lee Brian Scott and Pat Goecke of the Longmont Police Bureau. Mr. LaFrankie was not advised of his rights per *Miranda*. Mr. LaFrankie initially denied involvement. Detectives Scott and Goecke continually browbeat Mr. LaFrankie for approximately thirty minutes. The Detectives used unlawful and coercive tactics to elicit incriminating statements from Mr. LaFrankie. The Detectives implied judicial leniency would follow if Mr. LaFrankie confessed.

2. The totality of the circumstances created a de facto custody situation. Responses form Nr. LaFrankie were clearly the product of interrogation. Therefore, the requirements of the *Miranda* decision and it's progeny apply.

3. Following incriminating statements by Mr. LaFrankie, the police obtained permission to search Mr. LaFrankie's home. All evidence seized as a product of this search were the direct fruits of the illegal conduct by the officers in coercing a confession and coercing Mr. LaFrankie's cooperation with the search.

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APPENDIX B

DISTRICT COURT
COUNTY OF BOULDER
STATE OF COLORADO

Action No. 92CR601

REPORTER'S TRANSCRIPT **November 30, 1992**

The People of the State of Colorado,

People,

vs.

L.B. LaFrankie,

Defendant.

The Motions Hearing in this matter commenced on November 30, 1992 before the HONORABLE JOSEPH J. BELLIPANNI, Judge of the District Court in and for the County of Boulder, State of Colorado.

For the People: Mr. Steve Louth

For the Defendant: Mr. John Lucas

THE COURT: The first question before the Court is whether-or-not there was custodial interrogation and the standard of determining whether-or-not there is custodial interrogation is whether a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner during a police interrogation in which the defendant is exposed to a risk of self incrimination. The facts of the interrogation are as follows, the defendant was asked questions so I don't think there is an issue about whether there was an interrogation. The question is whether-or-not there was custody. Those questions were asked during a 30 minute interview at the defendant's place of work. It was conducted in a room that was about 15 by 15. There was no one else there besides the defendant and the two officers. The officers did not advise the defendant of his rights pursuant to *Miranda*. The Court has a transcript of the investigation and interrogation and the Court's conclusion, based upon its review of the transcript and the testimony, is that the officers were there to get the defendant to tell them that he stole this computer. That is what this is about. This is not an interview in which the officers are there to obtain information. It's clear from the tone of the interrogation that they have already come to the conclusion that he is the person who did it. You wouldn't tell people that you knew they were lying or you thought they were lying or things would go easier on them if they told the truth unless you were pretty much convinced that you had the person who stole the computer. So, the tenor of the entire 30 minute conversation is clearly that the defendant is a person who stole the computer and why doesn't he just tell the truth. So, it is accusatory in its tone, clearly. The other pieces of information that are significant in determining whether a reasonable person would have determined that his freedom of movement had been significantly affected, include whether he is told that he is free to leave. In this case, he has not been told that he was free to leave. At no time was he told that he was free to leave. That distinguishes the case from Horn except it distinguishes it in the way in which the prosecution would not like it distinguished. In Horn in which the Court found that the

defendant was in custody and that the determination was affirmed by the Supreme Court, the defendant was told that he was free to leave and the Court felt that that was still insufficient, given the other facts that were present. Here, the other facts that are present that are significant are as follows, the defendant is accused of lying on several occasions. During the course of the interview, the defendant--the issue of the polygraph exam is discussed. It's discussed and the officers tell him that he would fail a polygraph exam because he is lying. He is told that he should tell the truth because it's better to tell the truth than to lie and the Judge would be easier on him if he told the truth. Those things are true but the issue is not whether-or-not the truth is being told but the issue is whether-or-not the defendant, who is sitting there listening to this, gets the idea he is free to get up and walk out the door or he believes he is not free to get up and walk out the door He is told that he wouldn't be taken into custody unless he committed a murder and so that fact weighs against finding that he is in custody. He understands that he is not going to be taken to the jail at that time but that is also the case in Horn. He is also told in Horn that, well, charges will be filed against him, he won't be taken into custody that day and he was told that he is free to leave. The Court's view of the encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise, *Miranda* doesn't mean anything. I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out. In this case, the Court believes there was custodial interrogation. There weren't any warnings pursuant to *Miranda* and, therefore, the statements made by the defendant should be suppressed. There is a further

issue of voluntariness and the test for voluntariness is based on the totality of the circumstances and there are many things to determine whether-or-not the statement is involuntary, pursuant to law. The Court has found that he was in custody and he was not free to leave and he was not aware he was free to leave. There were not *Miranda* Rights given to the defendant. The statements that were made inculpatory were made during the course of the interrogation and not volunteered. The Court doesn't believe there were threats made in the sense of consequences that would occur to the defendant if he didn't tell the officers what they wanted to hear. There were statements of truth made and the Court doesn't believe that statements of truth create involuntary statements on behalf of the defendant. The officers are telling the truth when they say that, "it's probably going to be easier on you if you admit." They are telling the truth about the way in which--how he might feel better if he told the truth, those kinds of things, how it might go better for him, all those things are the truth and the Court doesn't believe those are threats or promises. The statements made about any promises, there is some implied issues about things going easier for you if you testify--if you tell the truth than if you don't but the Court doesn't believe those are the kinds of promises that rise to a level of overboring somebodys will in order to get their statements and making the statements involuntary. There are certainly no overt threats or promises. The style used by the questioners was an approach which was low-keyed, in the Court's view, in the sense of certainly there isn't a beating or yelling or all of those kinds of things that could have happened and the Courts have recognized maybe the soft approach is inappropriate sometimes as well but there is no indication this is a defendant that is particularly susceptible, excuse me, to mental coersion. The technique was a technique which was fairly low key and that is not going to be calculated to overbore somebodys will as well as there is no evidence before the Court that would indicate that the defendant's physical or mental condition was utilized in any inappropriate manner. He is a person who works with computers, has some sophistication. He has some significant history with the

criminal justice system. He has been advised of his rights in a prior case and, therefore, has heard that he has a right to remain silent and not testify and he has been advised of that during the course of entering a plea to a charge in the past. All of those factors put together, the totality of the circumstances lead the Court to the conclusion that the statements are not involuntary as required, as defined under the law and, therefore, the Court does not believe that the statements were the product of involuntary interrogation. So, the Court is not going to--for other purposes that may be used during the course of the trial, the Court rules that the statements are not involuntary.

REPORTER'S CERTIFICATE

I, Sharon Garone, Certified Shorthand Reporter within and for the Boulder District Court, County of Boulder, State of Colorado, do hereby certify that I was present at and reported on the Stenograph Machine the Hearing in the above-mentioned matter; that the foregoing seven pages, including this page, contain all of the testimony and findings of fact at said Hearing and the same is a true and correct transcript, as requested.

_____

Sharon Garone, CSR

APPENDIX C

SUPREME COURT, STATE OF COLORADO
Case No. 92SA476 October 4, 1993

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff/Appellant,

v.

LESLIE BENJAMIN LaFRANKIE,

Defendant/Appellee.

Interlocutory Appeal for the District Court, Boulder County
Honorable Joseph J. Bellipanni, Judge

EN BANC **RULING AFFIRMED**

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Twentieth Judicial District
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David F. Vela, Colorado State Public Defender
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Attorneys for Defendant/Appellee

JUSTICE SCOTT delivered the Opinion of the Court. JUSTICE MULLARKEY dissents. CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in the dissent.

The People bring this interlocutory appeal pursuant to section 16-12-102(2), 8A C.R.S. (1986), asking that we reject the determination of the trial court and reverse its order suppressing statements made to the police by the defendant. After examining the totality of the circumstances, the district court concluded that because the defendant was interviewed by the police for the purpose of obtaining a confession and because the defendant reasonably believed he was not free to leave, the defendant was subjected to a custodial interrogation. For these reasons, and due to the fact that the police failed to advise the defendant of his *Miranda* [5] rights, the district court granted the defendant's motion to suppress. We find sufficient evidence to support the trial court's determination that defendant's statements were made in the course of a custodial interrogation, and accordingly we affirm.

I.

On April 10, 1992, the defendant below, Leslie Benjamin LaFrankie (LaFrankie), was questioned by two Longmont police detectives regarding the theft of a computer from LaFrankie's place of employment, High Tech Manufacturing (High Tech). The detectives, Lee Brian Scott and Pat Goeke, singled out LaFrankie for questioning based on information provided by management personnel at High Tech who suspected that LaFrankie had committed the theft because LaFrankie had access to the computer and had made suspicious statements to High Tech personnel.

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[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The detectives arrived at High Tech at about 3:00 p.m. and spoke briefly with High Tech's management personnel, including its president. After meeting with the police officers, a High Tech manager was dispatched to escort LaFrankie, who was working on the production floor, to the main administrative area where the detectives were waiting in an area just outside the president's office. Upon LaFrankie's arrival, the detectives identified themselves and, in the presence of High Tech's management staff, asked LaFrankie if he "had a few minutes to talk." LaFrankie, stating that he wanted to get the matter straightened out, agreed to meet with the officers.

Still in the presence of the management staff, the detectives were directed to the president's office so that they could speak privately with LaFrankie. Officer Scott described the office as "very large" (fifteen feet by fifteen feet) and "well-lit." The detectives closed the office door and began their questioning.[6] One detective sat in a chair next to LaFrankie and the other sat about six feet away. Both detectives were armed but no weapons were visible. Officer Scott began the interview by explaining to LaFrankie that people frequently made mistakes and that the best thing to do was to try and rectify the mistake once "you realize your error." Officer Scott stated that he believed LaFrankie had knowledge of the recent computer theft because LaFrankie had made statements regarding the theft before anyone else at the plant, except the president and general manager, knew about the incident. LaFrankie denied knowing anything about the whereabouts of the stolen computer. Officer Scott then asked LaFrankie if he would consent to a search of his house. LaFrankie said he would allow such a search and admitted that the officers would find a computer there, but said he did not believe that the computer at his house

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[6] The interview was tape-recorded without LaFrankie's knowledge. The tape and a transcript of the interview were admitted into evidence at the suppression hearing.

was the one stolen from the office. In apparent disbelief, Officer Scott told LaFrankie that he was acting "as nervous as a cat on a hot tin roof." LaFrankie then explained he was nervous because he had recently purchased a computer from a garage sale for $200 and it was possible that the computer he purchased was the one that had been stolen from the plant. Officer Scott again indicated disbelief at LaFrankie's story and told LaFrankie he thought he was lying. The majority of the interview was conducted in a similar fashion. For example, Officer Scott told LaFrankie not to worsen his mistake by lying; that LaFrankie would fail a polygraph test because he was lying; that LaFrankie had "a big bright sign on [his] forehead that says you made a mistake here"; that LaFrankie's story was too coincidental to be believed; that LaFrankie looked nervous and sweaty -- as if he were lying; that LaFrankie could be used as a "poster boy for lying"; and that LaFrankie had insufficient funds in his checking account to purchase a computer for $200 cash. Nonetheless, LaFrankie steadfastly maintained his innocence through most of the interrogation.

However, after about thirty minutes of this type of questioning, LaFrankie confessed to having stolen the computer. In the course of the closed-door interview, LaFrankie was never informed that he was free to leave or that he was not in official custody. Neither Officer Scott nor Officer Goeke advised LaFrankie of his *Miranda* rights before or during the interview. Immediately before he confessed, however, LaFrankie was informed that if he admitted his participation he would not be arrested and put in jail that night, but that a felony summons would be issued in six weeks if charges were to be filed against him. After confessing to the theft, LaFrankie led the detectives to his home and allowed them to search his home to recover the stolen computer.

LaFrankie was charged with theft of a thing of value of $300 or more, in violation of section 18-4-401(1)(a), 8B C.R.S. (1986). On May 27, 1992, he was served with a summons to

appear. He subsequently filed a motion to suppress his confession and the evidence obtained as a result of his April 10 interview with Officers Scott and Goeke. After a hearing on November 30, 1992, the district court granted LaFrankie's motion to suppress, finding that LaFrankie was subjected to a custodial interrogation without having been advised of his *Miranda* rights. We affirm the order of the district court granting LaFrankie's motion to suppress.

II.

Under *Miranda v. Arizona*, 384 U.S. 436, 444, 478, 479 (1966), evidence obtained as the result of a custodial interrogation may not be used against a defendant unless, prior to questioning, the defendant is warned that he has the right to remain silent, that any statement he makes may be used as evidence against him, that he has the right to have an attorney present, and that he has the right to have an attorney appointed for him if he cannot afford one. See *Jones v. People*, 711 P.2d 1270, 1275 (Colo. 1986) (statements made during custodial interrogation are admissible only if defendant was given a *Miranda* advisement). Here, there is no dispute that LaFrankie was not advised of any of these rights. Thus, if the interview in question constituted "custodial interrogation," the evidence obtained as a result of the interview must be suppressed. *People v. Horn*, 790 P.2d 816 (Colo. 1990).

"Interrogation" refers to words or actions "on the part of the police officer that the officer 'should know are reasonably likely to elicit an incriminating response from the suspect.'" *People in Interest of J.C.*, 844 P.2d 1185, 1189 (Colo. 1993) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)). Here, it is undisputed that the interview in question was designed to elicit incriminating information from LaFrankie. Thus, the only question is whether the interrogation was custodial in nature.

Custody is not limited to those situations in which a formal arrest has taken place, but also includes those situations where the

person interrogated "has been significantly deprived of his freedom of action." *People v. Trujillo*, 784 P.2d 788, 791 (Colo. 1990). An interrogation is custodial if a reasonable person in the suspect's position would believe that he is deprived of his freedom of action in any significant way. *Horn*, 790 P.2d at 818; *accord People v. Cleburn*, 782 P.2d 784, 786 (Colo. 1989). In determining whether a reasonable individual in the same situation would feel significantly deprived of his freedom of action, a court must consider the totality of the circumstances surrounding the interrogation, including the following factors:

> [t]he time, place and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

People v. Thiret, 685 P.2d 193, 203 (Colo. 1984), *quoted in Horn*, 790 P.2d at 818 and *Trujillo*, 784 P.2d at 791.

The issue of custody is "essentially a factual question that involves a trial court's assessment of the credibility of witnesses and a weighing of their testimony." *Trujillo*, 784 P.2d at 792. Our role on appeal, therefore, is to "determine whether the trial court's findings of historical fact are adequately supported by competent evidence and whether the court applied the correct legal standard to these findings in resolving the issue before it." *Id.* A trial court's findings of fact will not be reversed on appeal when

supported by competent evidence and when the trial court applied the correct legal standard. *Horn*, 790 P.2d at 818.

In the instant case, the People allege that the district court focused on the interviewing detectives' desire to extract a confession, to the exclusion of other factors which should have been considered as part of the "totality of the circumstances." As evidence that the district court erroneously based its finding of custody on the detectives' admitted desire to elicit a confession, the People point to the following passage from the court's order:

> [T]he encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. [O]therwise *Miranda* doesn't mean anything.

We agree that this excerpt from the district court's order, when read alone, may be misleading since it could be interpreted to require a *Miranda* advisement whenever the purpose of an interrogation is to gain a confession.[7] The court's order, however, clearly sets forth the standard established by our precedent for determining whether the defendant was subjected to a custodial interrogation, *i.e.*, that "a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner during a police interrogation."

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[7] While the purpose of an encounter is one of the prominent factors which should be considered in determining if a reasonable person would feel deprived of his freedom of action in a significant way, *see Thiret*, 685 P.2d at 203, we do not today establish a *per se* rule whereby a *Miranda* advisement is required any time a police officer's actions are motivated by the desire to obtain a confession or other information from a suspect.

Moreover, the court's conclusion that the interrogation was custodial is based on factors other than the motivation behind the detectives' questioning of LaFrankie. In reaching its decision, the court focused on the totality of the circumstances surrounding the interview, including the "accusatory tone" used by the detectives [8] and the fact that the detectives never told LaFrankie that he was free to leave. Additionally, the court noted that the interview took place at LaFrankie's place of employment; that the interrogation took place in the president's office in a 15-by-15 foot room;[9] that

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[8] On at least ten different occasions the detectives expressed disbelief at LaFrankie's statements. At one point, Officer Scott told LaFrankie, "Listen to me, Ben. Don't blow smoke at me, cause I'm going to find out, okay." In another instance Officer Scott told LaFrankie, "you have a big bright sign on your forehead that says you made a mistake here." Additionally, Officer Goeke told LaFrankie "we could use you as a poster boy for lying."

[9] Although the interrogation by Officers Scott and Goeke did not take place at the station house, there can be few places more intimidating or potentially coercive to an individual than one's place of employment. This is especially true when the employee is first confronted in the presence of senior management, escorted to the president's office, interviewed while the door is closed, and never informed that he is free to leave. **See**, *e.g.*, *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989) (holding that a bank employee questioned by police in bank president's office was subjected to custodial interrogation); *United States v. Nash*, 563 F.2d 1166 (5th Cir. 1977) (finding custodial interrogation where suspect was taken to security office at his place of employment by his supervisor, interrogated by an FBI agent for 45 minutes with the office door closed, and was not informed that he had the right to leave the office); *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971) (interrogation custodial where police questioned suspect at his place of business); **cf.** *United States v. Dockery*, 736 F.2d 1232 (8th Cir. 1984) (police questioning of defendant at place of employment not custodial where defendant initiated interview and was told that she did not have to answer any questions, that she was not under arrest, and that she was free to leave at any time). While the place of interrogation is significant, it is not controlling. **See generally** 1 Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 6.6 (1984) (questioning has been held to be noncustodial where it occurred at a place of employment, however the circumstances of the particular case need to be carefully assessed; police

the only people in the room were the two police officers and LaFrankie; that the interview lasted for thirty minutes; that LaFrankie was accused of lying on several occasions; that LaFrankie's statements were "not volunteered"; and that LaFrankie was told he would fail a potential polygraph test.

We hold that this evidence is competent to support the order of suppression. Our decision is supported by *People v. Horn*, 790 P.2d 816 (Colo. 1990), where we found the evidence of custodial interrogation sufficient to support the trial court's suppression order. As in the instant case, in Horn we noted the significance of the following facts: the interview was "accusative from the outset" (the defendant was accused of lying at least five times); during the course of the interview the defendant was urged to take a polygraph exam and encouraged to confess for the therapeutic value of the confession; the interview was conducted in an 8-by-12 foot room; the interview lasted for about thirty minutes; only the interrogating officer and defendant were present; and the sole purpose of the questioning was to obtain a confession from the defendant. *Id.* at 818-19. Additionally, unlike the instant case, the defendant in Horn was "repeatedly told that he was free to leave."[10] *Id.*

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interviews were held to be custodial where an employee was marched off to a security office of his employer, or where a suspect was put into a police-dominated situation).

[10] In *Horn*, the interview took place at the police station. Although this fact certainly supports a finding of custody, it is not conclusive. *United States v. Hudgens*, 798 F.2d 1234 (9th Cir. 1986); *Graham v. State*, 535 N.E.2d 1152 (Ind. 1989); *State v. Perkins*, 444 N.W.2d 34 (S.D. 1989). Moreover, in *Horn*, it does not appear that either the district court or this court emphasized the location of the interview more than any other factor in determining the existence of custodial interrogation. *Horn*, 790 P.2d at 818-19.

Finally, we believe that the district court applied the correct legal standard in resolving the case before us. At the outset of its order the court stated that the standard for determining custodial interrogation is whether "a reasonable person in the defendant's position would have considered himself deprived of his freedom of action in a significant manner," almost a verbatim restatement of the standard utilized in *Horn*, *Trujillo*, and *Cleburn*. *See* discussion *supra*, pp. 5-6. And in concluding that LaFrankie was in custody, the court stated as follows:

> I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. **You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out**. In this case, the Court believes there was custodial interrogation.... **The Court has found that he was in custody and ... he was not aware he was free to leave**.

(Emphasis added). Thus, it appears that the court was well aware of the proper legal standard and correctly applied that standard to the totality of the circumstances in making its determination.

III.

In summary, we agree with the district court that LaFrankie was subjected to custodial interrogation, without having been advised of his rights pursuant to *Miranda*. The district court considered the totality of the circumstances, including the purpose of the interview, the words used by the officers, the setting and duration of the interview, and the fact that LaFrankie was never informed that he was free to leave the interview, and, in doing so,

found that the interrogation of LaFrankie was custodial. In reaching this conclusion, the court applied the correct legal standard, *i.e.*, whether a reasonable person in the suspect's position would feel significantly deprived of his or her freedom of action. Thus, we affirm the order of the district court suppressing statements and evidence obtained as a result of the April 10 custodial interrogation of the defendant.

JUSTICE MULLARKEY dissents. CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in the dissent.

JUSTICE MULLARKEY dissenting:

I respectfully dissent.

The majority holds that the trial court's suppression of statements and evidence obtained as a result of the interview by the police of the defendant on April 10, 1992, is appropriate because the trial court correctly found that the defendant was subjected to a custodial interrogation without having been advised of his *Miranda* [1] rights. I disagree with the majority's conclusion. The trial court's excessive reliance on the "accusatory" state of mind of the interviewing officers in its determination that the defendant was in custody, combined with what the majority opinion accurately describes as the court's "misleading" view of *Miranda*, demonstrate that the trial court did not correctly apply the appropriate legal standard to the findings of fact. I would reverse and remand with directions to apply the correct legal standard for determining when a police interrogation is custodial in nature.

I

The record in this case reveals that when officers Scott and Goeke asked the defendant if he would speak with them, the defendant agreed and stated that he wanted to "get the matter straightened out." The officers then interviewed the defendant in the company president's office for approximately thirty minutes. During that time, the defendant was not advised of his *Miranda* rights nor was he informed that he was either under arrest or free to leave. When the defendant asked the officers what would happen if the computer at his house was the one which was stolen, he was informed that he would not be taken into custody, but that a felony summons would be issued in about six weeks. The

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

defendant later testified in the suppression hearing that he felt compelled to remain in the office with the police officers for two reasons: first, because of the general intimidation caused by the presence of two police officers, and second, because company management wanted him to speak with the officers.

The trial judge's order describes the issue in this case as whether or not the defendant was in custody at the time of the interview. The order then lists several factors weighed by the court in deciding the custody issue, with special emphasis upon the fact that the officers spoke in an "accusatory" tone and that they repeatedly expressed to the defendant that they believed him to be lying. In the trial court's view, it was "clear from the tone of the interrogation that they have already come to the conclusion that he is the person who did it." After stating that "the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about," the court concluded that there was custodial interrogation and that the statements should be suppressed.

Contrary to the impression generated by the majority opinion the trial court's order does not end there. Rather, the order proceeds to discuss in detail the separate issue of whether the defendant's responses during the interview were voluntary, that is, whether they were the product of coercion or threats by the police. The trial court made several findings of fact on this issue:

> **The Court does not believe that there were threats made** in the sense of consequences that would occur to the defendant if he didn't tell the officers what they wanted to hear. There were statements of truth made and the Court doesn't believe that statements of truth create involuntary statements on behalf of the defendant. The **officers are telling the truth when they say that, "it's probably going to be easier on you if you**

> **admit....**" There are certainly no overt threats or promises. **The style used by the questioners was an approach which was low-keyed**, in the Court's view, in the sense of certainly there isn't a beating or yelling or all of those kinds of things that could have happened.... The technique was a **technique which was fairly low key and that is not going to be calculated to over[bear] somebody's will** as well as there is no evidence before the Court that would indicate that the defendant's physical or mental condition was utilized in any inappropriate manner.... All of those factors put together, the totality of the circumstances lead the Court to the conclusion that the statements are not involuntary ... and, therefore, the **Court does not believe that the statements were the product of involuntary interrogation**.

(Emphasis added).

The trial court order does not attempt to reconcile its apparently conflicting descriptions of the interview: on the one hand, the trial court found the conversation was highly "accusatory" when viewed as a custody question, yet, on the other hand, it found that the same conversation involved only true statements, was "low key" and was not "calculated to over[bear] somebody's will" when viewed as a voluntariness question.

II

The test for determining whether a person is in a custodial setting is "whether a reasonable person in the suspect's position would consider himself deprived of his freedom of action in a significant way" during a police interrogation in which the defendant was exposed to the risk of self-incrimination. *People v.*

Probasco, 795 P.2d 1330, 1334 (Colo. 1990); *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988). A court must examine the totality of the circumstances on a case-by-case basis to determine whether the *Miranda* protections apply. *People v. Wallace*, 724 P.2d 670, 673 (Colo. 1986); *People v. Thiret*, 685 P.2d 193, 203 (Colo. 1984). While courts are to consider factors such as the purpose of the encounter and the tone of voice and general demeanor of the interviewing officer, *id.* at 203, we have held that the police officer's subjective state of mind is not an appropriate standard for determining whether an individual has been deprived of his freedom of movement in a significant way. *Wallace*, 724 P.2d at 670, 673; *People v. Black*, 698 P.2d 766, 768 (Colo. 1985); *People v. Johnson*, 671 P.2d 958 (Colo. 1983).

Although the trial court, at the outset of its order, correctly states this objective test for deciding whether the defendant was in custody, the remainder of the order raises serious doubts as to whether the court correctly applied that test in this case. First, the court was clearly laboring under the false assumption that custody is triggered for *Miranda* purposes whenever a police interview is designed to elicit a confession.[2] The problem with such a view of *Miranda* is that it shifts the focus of the custody inquiry from the objective test of what a reasonable person in the defendant's

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[2] The relevant passage of the trial court's order reads as follows:

> The Court has a transcript of the investigation and interrogation and the Court's conclusion . . . is that the officers were there to get the defendant to tell them that he stole this computer. This is what this is about. . . . The Court's view of the encounter indicates to the Court that since the purpose of the interview was to get the defendant to confess, that that is what custodial interrogation is about and that is what *Miranda* is about. If you are going to interview somebody who you are going to try to get a confession from, you at least have to advise them of their rights. That is what *Miranda* is about, otherwise, *Miranda* doesn't mean anything.

situation would believe, to a subjective inquiry, previously rejected by this court, into the state of mind of the interviewing officers. See, *e.g.*, *Black*, 698 P.2d at 768; *People v. Corley*, 698 P.2d 1336, 1339 (Colo. 1985) (finding no custodial interrogation despite fact that the investigating officer "focused" on the defendant as a suspect).

The majority opinion finds the trial court's "misleading" view of *Miranda* harmless in light of that court's apparent reliance on other factors. The record reveals otherwise. The majority, for example, points out that the trial court clearly considered the "accusatory tone" of the interview as a key factor in its decision. The trial court order, when read in its entirety, reveals, however, that while the police officers communicated their belief that the defendant was lying to them, they did so in a "low-keyed" manner. Moreover, the officers followed such accusatory statements with what the trial court deemed to be "statements of truth," such as that the defendant would benefit from being honest with the police. The trial court described the interview technique as a "soft approach" that was not "calculated to over[bear] sombody's will." Finally, unlike in *People v. Horn*, 790 P.2d 816 (Colo. 1990), where the interviewing officer informed the defendant that charges would be filed against him regardless of the defendant's responses, the record here reveals that despite the police officers' accusatory tone, LaFrankie was told that he would not be taken into custody "unless he committed a murder."

The trial court's focus on the "accusatory" tone and content of the interview in its analysis of the custody issue, when contrasted with its approval of the officers' "soft approach" under its voluntariness analysis, suggests that the trial court's misreading of *Miranda* fatally infected its reasoning in this case. That is, the trial court appears to have decided the custody issue based almost exclusively upon its conclusion that the police officers intended from the outset to procure a confession. The majority, however, cites several other "factors" mentioned in the order as examples of

the trial court's correct application of the objective custody test. For example, the majority points to the fact that the trial court described the interview as transpiring in the president's office in a fifteen- by-fifteen foot room. While the majority chose to view that fact as highly relevant to the custody decision, finding "few places more intimidating or potentially coercive to an individual than one's place of employment," maj. op. at 9 n.5, there is no indication anywhere in the record that the trial court placed a similar gloss on the office dimensions.[3] Indeed, the majority's assumption that one's work place is somehow inherently "intimidating" and "potentially coercive" is a false generalization and not an accurate statement of the law.[4] Moreover, the majority

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[3] The majority emphasizes the factual similarities between this case and *Horn*, citing, among other things, the dimensions of the interview room in each case. Upon closer inspection, however, the two cases are distinguishable in important ways. For example, the majority cites the eight-by-twelve foot dimensions of the room in *Horn* as indicative of the fact that the trial court in this case must have found the fifteen-by-fifteen foot dimensions relevant in its analysis of the custody issue. The majority fails to mention, however, some key facts in *Horn* that distinguish it from the case at hand: in *Horn*, the trial court specifically pointed out that the eight-by-twelve foot room was "windowless" and "located in a secured area of the basement of the police station." *Horn*, 790 P.2d at 819. No such additional information is provided in the trial court order in this case.

[4] The relevant federal precedent rejects such a sweeping view of the employment context in custody analysis:

> The place where an interrogation takes place does not conclusively establish the presence or absence of custody. A deprivation of freedom may take place at one's home as well as at the police station. *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L. Ed. 2d 311 (1969). By the same token, an interrogation at the police station may be noncustodial. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L. Ed. 2d 714 (1977). . . . Determining if there has been a deprivation of freedom entails something more than simply identifying the place of interrogation.

opinion omits to mention the fact that the defendant testified that he remained in the office with the police largely due to the fact that the company managers for whom he worked asked him to cooperate with the investigation. Where normal employment obligations give rise to restrictions on an employee's freedom to move, such restrictions will not in themselves support a finding that the employee is in custody. *Probasco*, 795 P.2d at 1334-1335; *accord Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by actions of law enforcement officials . . . but by the workers' voluntary obligations to their employers."); *United States v. Dockery*, 736 F.2d 1232 (8th Cir.), *cert. denied*, 469 U.S. 862 (1984) (finding a bank employee not in custody when ordered by her employer to accompany F.B.I. agents to an office as part of an investigation into bank embezzlement). In this case, the defendant consented to speaking with the police at the request of his employer, and a reasonable employee in the defendant's situation would have believed that he was "simply following the orders of a superior in his place of employment." *Probasco*, 795 P.2d at 1334. As such, he would not be in custody for *Miranda* purposes by virtue of his belief that his employer expected him to cooperate.

Finally, the majority cites other facts mentioned in the order, such as the thirty minute duration of the interview and that the only people present at the interview were the defendant and the two police officers, maj. op. at 9-10, to support its view that the trial court correctly applied the objective custody test. Unfortunately, however, such facts are not analyzed or commented upon in the trial court order as weighing either for or against a

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United States v. Jones, 630 F.2d 613, 615 (8th Cir. 1980), quoted in *United States v. Carter*, 884 F.2d 368, 371 (8th Cir. 1989).

determination that the interrogation was custodial.[5] Rather, the trial court's only explicit analysis of specific facts for purposes of custody determination can be found in two instances: first, when the court explains that the police officers' statement to the defendant that he would not be taken into custody unless he committed a murder "weighs against finding that he is in custody," and second, when the court erroneously states that custodial interrogation is triggered by police intent to procure a confession.

III

In summary, the record fails to support the conclusion that the trial court applied the correct legal standard to the facts in this case. Because I believe the trial court did not apply the correct legal standard, it is not necessary to reach the issue of whether or not the trial court's decision to suppress the relevant statements was "adequately supported by competent evidence." *People v. Trujillo*, 784 P.2d 788, 792 (Colo. 1990). The various "factors" cited by the majority as proof that the court correctly applied the appropriate test are overshadowed by the trial court's erroneous view of *Miranda*. The record shows that the trial court was more concerned with the subjective state of mind of the police than what a reasonable person in the defendant's situation would have believed. The only factors upon which the trial court undisputedly relied in making its custody determination were the facts that the police intended from the outset to procure a confession and that the police spoke to the defendant in an "accusatory tone." Those two

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[5] Once again, *Horn* provides an important contrast to this case. In *Horn*, for example, the trial court explained that the thirty minute duration of the interview was significant "because of the highly confrontational nature of the encounter." *Horn*, 790 P.2d at 819. In light of the "soft approach" taken by the police in the present case, the relevance of the thirty minute duration is at best unclear.

factors, by themselves, cannot support a finding that the interrogation was custodial in nature.

For the foregoing reasons, I respectfully dissent.

I am authorized to say that CHIEF JUSTICE ROVIRA and JUSTICE VOLLACK join in this dissent.

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CASE NO. 93 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF COLORADO,

Petitioner

v.

LESLIE BENJAMIN LAFRANKIE

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari to the Colorado Supreme Court

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court should deny Petitioner's application for certiorari because in its petition arguing for a modification of the legal standard of "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), that claim was not pressed or passed on below and thus is not appropriate for review under *Illinois v. Gates*, 462 U.S. 213 (1983)?

2. Whether the United States Supreme Court should deny Petitioner's application for certiorari because there is no conflict among the federal circuit courts or the states as to what is the appropriate legal test for "custody" in triggering the need for an advisement pursuant to *Miranda*.

3. Whether the United States Supreme Court should deny Petitioner's application for certiorari because the district court and the Colorado Supreme Court applied the correct legal standard in suppressing statements made by Respondent to police detectives, and there is competent evidence in the record supporting the district court's findings?

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CASE NO. 93 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF COLORADO,

Petitioner

v.

LESLIE BENJAMIN LAFRANKIE

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the Colorado Supreme Court

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OPINIONS BELOW

The transcript of the testimony adduced at the hearing on Mr. LaFrankie's motion to suppress is Appendix A.

STATEMENT OF THE FACTS

Leslie Benjamin LaFrankie was suspected of stealing a computer from his employer, High Tech Manufacturing. (Appendix at p.3, l.16.) As part of the investigation, police detectives requested that Mr. LaFrankie be removed from his work area during work hours and be taken to the office of the president of the employer-victim. (App. at p.18, l.19 through p.20., l.13.) Mr. LaFrankie was then interrogated behind closed doors by two police detectives seated next to him. (App. at p.21, l.15

through p.22, l.20.) The interrogation was conducted on the same premises where the crime was committed. Mr. LaFrankie denied having taken the computer and explained how he came into possession of a similar computer that he had at his home. (App. at p.8, l.2.) The detectives told Mr. LaFrankie that he was lying. (App. at p.23, l.17.)

The majority of the interview was conducted in this fashion. For example, Officer Scott told LaFrankie not to worsen his mistake by lying, (App. at p.9, l.14.); that LaFrankie would fail a polygraph test because he was lying, (App. at p.26, l.18.); that Lafrankie had "a big bright sign on [his] forehead that says you made a mistake here;" *LaFrankie, supra*, App. to Pet. for Cert. at C-8, n.8; that LaFrankie's story was too coincidental to be believed, (App. at p.34, l.9.); that LaFrankie looked ; nervous and sweaty -- as if he were lying, (App. at p.29, l.22.); that he was as nervous as a cat on a hot tin roof, (App. at p.25, l.22.); that LaFrankie could be used as a "poster boy for lying (App. at p.26, l.24.);" and that LaFrankie had insufficient funds in his checking account to purchase a computer for $200.00 cash. (App. at p.13, l.9.) Nonetheless, LaFrankie steadfastly maintained his innocence throughout most of the interrogation. (App. at p.23, l.24 through p.24, l.6.)

Additionally, Mr. LaFrankie was effectively told that a polygraph <u>would</u> be conducted, and that he would fail it. (App. at p.29, l.20.) The police communicated to Mr. LaFrankie that he would be treated more leniently by a judge if he confessed.

(App. at p.28, 1.22.) Mr. LaFrankie was told that he had nothing to worry about if he confessed because he was not on probation. (App., at p.30, 1.6 through 14.) Mr. LaFrankie was told that Boulder County is extremely lenient - "the place they sent somebody to college for murdering somebody, okay. Okay." (App. at p.35, 1.21 - p.36, 1.1.) The police officers preyed on Mr. LaFrankie's religious beliefs to get him to confess, telling him, "God will know if he is lying." (App. at p.37. 1.18.)

After about thirty minutes of this type of questioning, Mr. LaFrankie confessed to having stolen the computer. (App. at p.10, L.13.) In the course of the closed-door interview, Mr. LaFrankie was never informed that he was free to leave or that he was not in official custody. (App. at p.23, 1.20.) Neither detective advised Mr. LaFrankie of his *Miranda* rights before or during the interview. (App. at p.7, 1.19.)

Mr. LaFrankie filed a motion to suppress statements and evidence in the trial court. The trial court found the interrogation to be custodial and suppressed Mr. LaFrankie's statement because to the absence of *Miranda* warnings. The prosecution appealed the trial court's findings to the Colorado Supreme Court. The Colorado Supreme Court affirmed the trial court's ruling.

The State filed a Petition for Writ of Certiorari in the United Stated Supreme Court on December 23, 1993. The petition was received by Respondent on the next business day, December 27, 1993. The brief in opposition to this petition is currently due to be filed on January 26, 1994.

SUMMARY OF THE ARGUMENT

Petitioner did not propose a modification of the definition of "custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966), in the state courts. Petitioner never argued to the lower courts that Colorado improperly examined "custody" with reference to whether "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id.* at 444, rather than whether there is "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983)(per curiam). As a result, this issue was never "pressed or passed upon below," *Illinois v. Gates,* 462 U.S. 213, 222 (1983), and consequently this Court should refuse to exercise its jurisdiction.

The Colorado Court correctly applied the objective, "reasonable person" test in evaluating whether Respondent was in "custody" for purposes of *Miranda*. That test conforms with the standard announced by this Court in *Berkemer v. McCarty,* 468 U.S. 420 (1984). The majority of lower federal and state courts also apply the objective standard to the Miranda "custody" determination. Thus, Petitioner's argument that there is a widespread misapplication of *Miranda* is without merit, and the petition for writ of certiorari should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE PETITIONER'S ARGUMENT CONCERNING THE CORRECT DEFINITION OF CUSTODY FOR MIRANDA PURPOSES WAS NOT PRESSED OR PASSED ON BELOW.

Petitioner did not propose a modification of the *Miranda* rule in the state courts. Knowing full well the status of the law in Colorado with regard to custody determinations, Petitioner nevertheless did not raise its novel interpretation of "restraints of the degree associated with arrest" nor press for its application in any state court proceeding. The record is devoid of any proposal for modification or reinterpretation of the long-standing totality of circumstances test.

This Court's disinclination to pass upon issues for the first time on certiorari is well-settled in the caselaw. *See, e.g., Illinois v. Gates,* 462 U.S. 231 (1983); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). In *Gates,* the respondents had filed a motion to suppress evidence seized pursuant to a warrant in the trial court. Their motion to suppress was granted, and that ruling was affirmed by both the Illinois Appellate Court and the Illinois Supreme Court. The initial issue in the petition for certiorari was the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. *Gates,* 462 U.S. at 217. This Court requested that the parties address an additional question; whether the exclusionary rule should be modified in particular situations. *Id.*

This Court declined to decide whether the exclusionary rule should be modified, however, and based its decision on jurisdictional grounds. Because the issue of modification was never "pressed or passed below," it was not properly before the Court. This Court's teaching regarding the jurisdictional issue in *Gates* is instructive in this case as well. In the *Gates* opinion, Justice Rehnquist identified several purposes underlying the "not pressed or passed upon below" rule:

> First, questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind. Exactly the same difficulty exists when the State urges modification of an existing constitutional right or accompanying remedy .... Likewise, due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions. Finally, by requiring that the state first argue to the state courts that the ... rule should be modified, we permit a state court, even if it agrees with the state as a matter of federal law, to rest its decision on an adequate and independent state ground.

Id. at 221-22, *citing Cardinale v. Louisiana,* 394 U.S. 437 (1969); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940)(quotations omitted). The Court further noted that "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule." *Id.* at 222-23.

All of the considerations explained in *Gates* are present in this case. The district court and the Colorado Supreme Court applied firmly established criteria to determine that the Respondent was in custody and subjected to police interrogation.

The legal test for custody determinations that was applied by the Colorado courts in this case is well-settled in Colorado, the state courts and the federal courts. If Petitioner desired that the Colorado courts apply the novel restriction that it has proposed in its Petition for Writ of Certiorari, then it should have raised that issue in the state courts, not for the first time in its Petition to this Court. The Colorado courts have not had the opportunity to consider this novel restriction and to choose to rest their decisions on adequate and independent state grounds. The Colorado court decisions involved "the routine restatement and application of settled law" and thus Petitioner should fail in seeking jurisdiction in this Court because its claim for modification has not been pressed or passed upon below.

II. THE PERCEIVED CONFLICT BETWEEN THE LAFRANKIE DECISION AND OTHER FEDERAL AND STATE COURT DECISIONS HAS NOT RESULTED IN A WIDESPREAD MISAPPLICATION OF MIRANDA AND THUS DOES NOT WARRANT THE GRANTING OF CERTIORARI BY THIS COURT.

Before addressing the substantive arguments raised by Petitioner, it is useful to have in mind the policy considerations that the *Miranda* case addressed. It is against the background of those policies that any discussion of the application of the principles enunciated in *Miranda* must take place.

The Fifth Amendment embodies one of the basic rights that are enshrined in our Constitution, *Miranda*, 384 U.S. at 442, and

provides, in pertinent part, that "No person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "[T]he Fifth Amendment privilege ... serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda,* 384 U.S. at 467 (emphasis added). The privilege embodies principles of humanity and civil liberty which were secured in the mother country only after centuries of persecution and struggle. *Withrow v. Williams,* ___ U.S. ___, 113 S. Ct. 1745, 1753 (1993); *Miranda,* 384 U.S. at 442. These precious rights were secured "for ages to come, and ... are designed to approach immortality as nearly as human institutions can approach it." *Id., quoting Cohens v. Virginia,* 6 Wheat. 2634, 387 (1821).

The maxim embodied in the Fifth Amendment had its origin in a protest against "inquisitorial and manifestly unjust methods of interrogating accused persons. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim ... became clothed in this country with the impregnability of a constitutional enactment." *Id. quoting Brown v. Walker,* 161 U.S. 591, 596-97 (1896).

Early in this century, this Court recognized its obligations vis-a-vis the Constitution and the Bill of Rights. "In stating the obligation of the judiciary to apply these

constitutional rights, this Court [acknowledged] ... that [r]ights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction." *Id.* at 443-44, *quoting Weems v. United States,* 217 U.S. 349, 373 (1910).

The *Miranda* court emphasized that it was against the backdrop of these principles that the *Miranda* cases were decided. "This [is] the spirit in which we delineate ... the manner in which the constitutional rights of the individual [can] be enforced against overzealous police practices.[1] It [is] necessary ... to insure that what was proclaimed in the Constitution ha[s] not become but a 'form of words' in the hands of government officials." *Id.* at 444, *citing Silverthorne Lumber Co. v. United States,* 251, U. S. 385, 392 (1920).

These principles reflect that notion that "a system of law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation. *Withrow v. Williams,* 113 S. Ct. at 1753, *citing Michigan v. Tucker,* 417 U.S. 433, 448 n. 23 (1974) (*quoting Escobedo v. Illinois,* 378 U.S. 478, 488-89 (1964)).

It has long been held that the Fifth Amendment prohibition against self-incrimination privileges a person not to answer official questions put to him in any proceeding, civil or

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1. An extensive review of the "overzealous police practices" that *Miranda* intended to remedy is set forth in the *Miranda* opinion at pages 445-455.

criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Minnesota v. Murphy,* 465 U.S. 420, 426 (1984), *citing Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). This protection is particularly necessary in the context of custodial interrogations because the compulsion to speak to law enforcement officials in an isolated setting may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation and trickery. *Orozco v. Texas,* 394 U.S. 324, 326 (1969), *citing Miranda,* 384 U.S. at 461.

Prior to *Miranda,* the admissibility of an accused's in-custody statements was judged solely by whether they were voluntary within the meaning of the Due Process Clause. *Oregon v. Elstad,* 470 U.S. 298, 304 (1985). In *Miranda,* recognizing that the Fifth Amendment privilege guarantees a person subjected to questioning "the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will," *Miranda* 384 U.S. at 460, *quoting Malloy v. Hogan,* 378 U.S. 1, 8 (1964), the Court addressed the problem of how the privilege could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court thus recognized that custodial interrogations, by their very nature, generate inherently "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *Moran v. Burbine,* 475 U.S. 412, 420 (1986), *quoting Miranda,* 384 U.S. at 467; *accord, Illinois v. Perkins,* ___ U.S. ___, 110 S.

Ct. 2394, 2397 (1990); *Murphy,* 465 U.S. at 430, "and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible coercion." *Burbine,* 475 U.S. at 426, *citing New York v. Quarles,* 467 U.S. 649, 656 (1984).

The coercion inherent in custodial interrogation derives from a number of circumstances common to questioning by law enforcement officials: isolation, *Miranda,* 384 U.S. at 445, 449 (the principal psychological factor contributing to a successful interrogation is privacy); unfamiliar surroundings, *id.* at 449, 450; lapse of time, *id.* at 451; lack of acquaintance with one's questioners, *Murphy,* 465 U.S. at 433; the incriminatory nature of the disclosures sought, *id.* at 430, *citing Garner v. United States,* 424 U.S., U.S. 648, 657 (1976); the fear of reprisal for remaining silent, *Perkins,* 110 S. Ct. at 2397; the hope of more lenient treatment should a confession be forthcoming, *id.*; insinuations that the interrogation will continue until a confession is obtained, *Murphy,* 420 U.S. at 433, *citing Miranda,* 384 U.S. at 468; repeated or successive interrogations, sometimes by police acting out friendly or unfriendly roles, *Orozco,* 394 U.S. at 328 (White, J. dissenting); the appearance that the officers control the suspect's fate, *Perkins,* 110 S. Ct. at 2397; the message that the suspect has no choice but to subjugate himself to the will of the examiner, *Murphy,* 465 U.S. at 433, *quoting Miranda,* 384 U.S. at 457; and the use of ploys such as cajolery and trickery, *Orozco,* 394 U.S. at 328 (White,

J. dissenting).

The "salient features" that the *Miranda* court sought to address may be summarized as the "incommunicado interrogation of individuals in a police-dominated atmosphere." *Miranda,* 384 U.S. at 445. To dissipate the overbearing compulsion inherent in custodial interrogation, the *Miranda* court required the exclusion of incriminating statements obtained during custodial interrogation unless, prior to any questioning, the person was warned that he has the right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda* at 444. The *Miranda* court thus presumed that interrogation in certain custodial circumstances is inherently coercive, *Elstad,* 470 U.S. at 305, *citing Quarles,* 467 U.S. at 654 (emphasis added), and attempted to safeguard against that inherent compulsion by giving the defendant the power to exert some control over the course of the interrogation. *Burbine,* 475 U.S. at 411 (emphasis in original).

The *Miranda* opinion iterated and reiterated the absolute necessity for officers interrogating people in custody to give the described warnings. *Orozco,* 394 U.S. at 326. One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated is the clarity of that rule. *Berkemer v. McCarty,* 468 U.S. 420, 430 (1984). Requiring *Miranda* warnings before custodial interrogation thus provides practical reinforcement for the Fifth Amendment privilege. *Elstad,* 470 U.S. at 305, *citing Quarles,* 467 U.S. at 654.

Failure to administer *Miranda* warnings creates a presumption of compulsion. *Id.* at 307. While failure of the police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, it does mean that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. *Id.* at 310 (emphasis added).

The policies underlying the *Miranda* decision have not dissipated over time. In the years since the decision in *Miranda,* this Court has frequently reaffirmed the central principle established by that case: "*Miranda* forbids coercion." *Perkins,* 110 S. Ct at 2397. The purposes of the safeguards initially prescribed by *Miranda* and still in full force today can be summarized as follows: to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist, and, as much as possible, to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. *Berkemer v. McCarty,* 468 U.S. at 433.

A. The Colorado Court's Definition of "Custody" for Miranda Purposes is the Same or Equivalent to the Definition Applied by other Federal and State Courts.

1. The United States Supreme Court does not adhere to a rigid definition of custody.

In *Miranda*, this Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The definition chosen created an elastic type of custody, David M. Nissman, et al., *Law of Confessions* §4.3 at 85 (1985), one that Petitioner now seeks to unduly contract. Since then this Court has reiterated this definition in cases construing the *Miranda* decision. *Bradley v. Ohio*, 110 S. Ct. 3258 (1990)(cert. denied)(Marshall, J., dissenting); *Maine v. Thibodeau*, 475 U.S. 1144, 1146 (1986)(cert. denied)(Burger, J., dissenting); *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984); *California v. Beheler*, 463 U.S. 1121, 1123 (1983)(per curiam); *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977)(per curiam); *Beckwith v. United States*, 425 U.S. 341, at n.6 (1976); *Orozco v. Texas*, 394 U.S. 324, 327 (1969); *Mathis v. United States*, 391 U.S. 1, 5 (1968). *See Oregon v. Elstad*, 470 U.S. 298, 309 (1985).

Petitioner makes its case for review by this Court on the premise that both the trial court and the Colorado Supreme Court interpreted *Miranda* too broadly in this case, and that state and federal courts around the nation have given "talismanic power"

to the phrase "otherwise deprived of his freedom of action in any significant way" for determinations of custody. (Pet. for Cert. at 9-12.) Petitioner cites to language in *Berkemer v. McCarty,* 468 U.S. 420 (1984); *Minnesota v. Murphy,* 465 U.S. 420 (1984); and *Beheler v. California,* 463 U.S. 1121 (1983), in support of the novel proposition that there can be custody only in situations where there is "formal arrest or restraints of the degree associated with arrest." What Petitioner desires is that "talismanic power" be accorded to the phrase "restraints of the degree associated with arrest," and for that language to modify, or more probably replace, the long-standing reasonable person test[2] by preventing the consideration by lower courts of the myriad factual contexts in which a custodial interrogation can take place.

Petitioner misapprehends the nature of this Court's writings in the progeny spawned by *Miranda*. The first significant decision from this Court following *Miranda* was *Mathis v. United States,* 391 U.S 1 (1968). Mathis was incarcerated in a Florida prison on an unrelated charge when an IRS agent questioned him briefly pursuant to a routine tax investigation. *Id.* at 2. Once Mathis incriminated himself, the government converted the investigation into a tax-fraud prosecution. *Id.* at 3. This Court found that *Miranda* warnings should have been administered on the grounds that the *Miranda* opinion in no way limited its application to persons who were in

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2. *See* discussion *infra* part II.B.

custody for the particular case under investigation. *Id.* at 4-5.

One year later, the Court was presented with its first opportunity to address the application of *Miranda* in a setting that, unlike a police station or a prison, is not inherently coercive in nature. In *Orozco v. Texas,* 394 U.S. at 324 (1969), this Court held that the questioning of a suspect under arrest in the confines of his boardinghouse room was the type of circumstance that was within the scope of *Miranda. Id.* at 326-27.

The reach of *Miranda* next arose in *Beckwith v. United States,* 425 U.S., at 341 (1976). *Beckwith* bears some relationship to both *Mathis* and *Orozco* in that IRS agents interrogated a suspect in a private home, *Beckwith,* 425 U.S. at 342; the Court, however, held that *Miranda* warnings were not required. *Id.* There are numerous distinctions, however, that support the Court's ruling. Unlike Mathis, who answered questions in a prison cell, Beckwith spoke with agents from the home of a friend for whom he was house-sitting. *Id.* at 342. Whereas Orozco was rousted from bed at 8:00 a.m. by four officers who forcefully entered his room, *Orozco,* 394 U.S. at 325, Beckwith faced police at a more reasonable hour and in a less volatile setting. *Beckwith,* 425, U.S. at 342. He also received a nearly complete panoply of warnings, *id.* at 348-49 (Marshall, J., concurring), that were deficient only in that they failed to advise Beckwith, who held a white collar job, of an indigent's right to appointed counsel. *Id.*

One year after *Beckwith,* the Court decided *Oregon v.*

Mathiason, 429 U.S. 492 (1977)(per curiam). *Mathiason* was a watered-down version of a station house interrogation. There, the police were investigating an unsolved theft when they ran across Mathiason - a parolee and friend of the complainant's son. After an officer left his card at Mathiason's apartment, Mathiason returned the call and arranged to meet the officer at the station house, only two blocks away. *Id.* at 423. Police told Mathiason he was not under arrest. *Id.* Early in the half-hour interview, Mathiason confessed after being told, falsely, that his fingerprints had been found at the scene of the crime. *Id.* In holding that the confession was admissible, the Court found that *Miranda* warnings "are required only when there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.* at 495.

The case of *California v. Beheler,* 463 U.S. at 1121 (1983)(per curiam), was the next significant decision in this area, coming seventeen years after *Miranda.* Beheler called the police to report that a woman he knew from a drug transaction had been fatally shot, and that his confederates had buried the murder weapon in Beheler's backyard. *Beheler* at 1122. After a consent to search uncovered the weapon, Beheler agreed to the officer's suggestion that he accompany him to the station house for questioning. *Id.* Police advised him that he was not under arrest, then interviewed him for half an hour and obtained a confession. A few days later, police arrested and warned Beheler, who waived his *Miranda* rights and again confessed, vowing that his prior confession was voluntary. *Id.*

In the *Beheler* case, the Court commenced its legal analysis by stating: "We held in *Miranda* that '[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Beheler,* at 1123, *quoting Miranda,* 384 U.S. at 444. Only later in the opinion did the court suggest, in a single sentence of arguable dictum,[3] the language that Petitioner now propounds as "talismanic": "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler,* at 1125, *citing Mathiason* at 495.

In *Minnesota v. Murphy,* 465, U.S. at 420 (1984), the Court's next pronouncement in the area of custodial interrogation, Mr. Murphy's probation officer, aware that he had admitted to a rape and murder to a treatment provider, wrote to Murphy and asked him to contact her. *Id.* at 423. Upon receiving the letter, Murphy made an appointment to meet with his probation officer at her office. *Id.* at 423. Conditions of probation previously imposed by the court required him to report to his probation officer as directed, and to be truthful with the probation officer in all matters. *Id.* at 422. At their meeting the probation officer confronted Murphy with the information she had received from his counselor, and Murphy

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3. Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and* Miranda's *Concept of Custody,* 1993 U. Ill. L.R. 379, 380 n. 11, 392 (1993)

confessed that he had committed the rape and murder. *Id.* at 423-424. The Court held that the probationer was not in custody for *Miranda* purposes. Although the case does refer to that language in *Beheler* which has taken on "talismanic" effect for Petitioner, the comparatively familiar, nonrestrictive nature of the encounter is certainly a less-than-significant deprivation of freedom. *See* Daniel Yeager, *Rethinking Custodial Interrogation,* 28 Am. Crim. L. Rev. 1, 17 n. 89 (1991).

The facts of these latter four cases are a far cry from the shared "salient features" of the cases that comprised the *Miranda* decision. There is no reason why a non-coercive station house meeting should automatically yield inadmissible evidence based solely on its locale. *Id.* at 15. *Miranda* does not require the exclusion of statements obtained in a presumptively coercive setting under arguably uncoercive circumstances. *Id.* Nor does it mandate the suppression of uncoerced statements from a probationer.

It is clear in these last two cases that, in utilizing the language which has become "talismanic" for Petitioner, this Court was simply trying to restate, without being repetitive, what it meant by "otherwise deprived of his freedom of action in any significant way." There is nothing in the Court's brief opinion in *Beheler* to suggest that it intended to replace "otherwise deprived of his freedom of action in any significant way" with "restraint on freedom of movement of the degree associated with arrest."[4] To the extent that this Court has

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4. It is unlikely that this Court would choose to modify some of the most

repeated the "restraint" language first set forth in *Beheler* in its subsequent opinions, it does so only in an effort to offer parallels to the *Miranda* definition of custody, which itself is frequently reiterated in those same opinions. *E.g., Bradley v. Ohio,* 110 S. Ct. at 3259 (cert. denied)(Marshall, J., dissenting); *Berkemer,* 425 U.S. at 435, 440; *New York v. Quarles,* 467 U.S. 649, 555, 662 (O'Connor, J., concurring and dissenting)(1984); *Beheler,* 463 U.S. at 1123, 1125 (1983).

Petitioner also relies on this Court's pronouncements in *Berkemer* to support its position that "custody" for *Miranda* purposes requires either formal arrest or "a restraint on freedom of movement of the degree associated with arrest." (Pet. for Cert. at 7-8.) However, the holding of the Court in that case was that persons temporarily detained pursuant to routine traffic stops are presumptively not in custody for purposes of *Miranda*.[5] The Court did not purport to re-address *Miranda's* definition of custody, but only to determine whether a particular category of Fourth Amendment seizures constitute per se a significant deprivation of a person's freedom of action, thereby triggering the need for *Miranda* warnings.

Petitioner cites *Berkemer* out of its factual context in

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crucial language of what is arguably its most significant decision in the realm of criminal procedure in a per curiam opinion, without receiving briefs or arguments on the merits. *See Beheler* at 1127 (Stevens, J., dissenting.)

5. The Court also indicated that if a motorist detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. *Berkemer,* 468 U.S. at 440.

proposing the modification of the *Miranda* rule. In *Berkemer v. McCarty,* 468 U.S. 420 (1984), this Court explicitly stated its purposes: to resolve confusion "regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops." *Id.* at 426-27. The case involved a traffic stop where the defendant claimed that his responses to roadside questioning should have been suppressed because he was subjected to custodial interrogation and not advised of his *Miranda* rights. This Court held that, in general, a typical traffic stop and detention would not trigger the need for a *Miranda* advisement because "[f]irst, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief ... [and] [s]econd, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police .... [T]he atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself ...." *Id.* at 437-39. This Court renewed its commitment to *Miranda,* and simply limited its application in factual circumstances like those found in *Berkemer*: "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Id.* at 437.

Thus, the holding of *Berkemer* is somewhat narrow and limited to its facts: it does not, contrary to what Petitioner suggests, supply critical analysis to that necessary for the

facts in this case. In this case, circumstances are present that go to the heart of this Court's holding in *Miranda*. Mr. LaFrankie the Respondent, was subjected to over thirty minutes of browbeating and interrogation in a totally incommunicado, police-dominated atmosphere; it is precisely this context in which *Miranda* was meant to apply. *See Miranda,* 384 U.S. at 445-58.

2. The Colorado Court's definition of custody is consistent with that articulated by this Court.

The Colorado courts have consistently cited the original language of the *Miranda* decision in defining custody for purposes of the *Miranda* warnings. Those warnings are required when a person is subjected to police interrogation after having been "taken into custody or otherwise deprived of his freedom of action in any significant way." *People v. Parada,* 533 P.2d 1121 (Colo. 1975), *quoting Miranda,* U.S. 348 at 444. *Accord People v. Hamilton,* 831 P.2d 1326, 1330 (Colo. 1992); *People v. Probasco,* 795 P.2d 1330, 1332 Colo. 1990), *cert. denied,* 498 U.S. 999 (1990); *People v. Lupy Trujillo,* 785 P.2d 1290, 1293 (Colo. 1990); *People v. Julian Trujillo,* 784 P.2d 788, 791 (Colo. 1990); *People v. Viduya,* 703 P.2d 1281, 1286 (Colo. 1985), *People v. Thiret,* 685 P.2d 193, 203 (Colo. 1984; *People v. Johnson,* 671 P.2d 958, 961 (Colo. 1983).

Colorado, like the United States Supreme Court, recognizes that custody encompasses more than formal arrest situations.[6]

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6. *E.g., Pennsylvania v. Bruder,* 488 U.S. 9 (1988) (*Berkemer* did not announce an absolute rule for all motorist detentions ... lower courts must be vigilant that police do not delay formally arresting detained motorists

People v. Thomas, 839 P.2d 1174, 1179 (Colo. 1992). As a result, custody includes, but is not limited to, the situation in which the defendant is actually placed under arrest. *Probasco,* 795 P.2d at 1332. "A person obviously is 'in custody' when that person has been subjected to the constraints associated with a formal arrest." *Thomas,* 839 P.2d at 1178, *quoting Julian Trujillo,* 784 P.2d 788, 791 (Colo. 1990). The *Miranda* requirements, however, are not limited to formal arrests, but also include police interrogations conducted under circumstances where the person interrogated has been deprived of his freedom of action in any significant way, *People v. Haury,* 859 P.2d 889, 893 (Colo. 1993); *Hamilton,* 831 P.2d at 1330; *Julian Trujillo,* 784 P.2d at 791 , by the attendant circumstances. *People v. Algien,* 501 P.2d 468, 471 (Colo. 1972). "[I]n the absence of actual arrest, something must be said or done by the authorities, whether in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." *Parada,* 533 P.2d at 1123, *quoting United States v. Hall,* 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

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and subjecting then to sustained and intimidating interrogation at the scene of their initial detention); *Berkemer,* 468 U.S. at 440 (if a motorist detained pursuant to a traffic stop is subjected to treatment that renders him "in custody," he will be entitled to the protections prescribed by *Miranda*); *Beheler,* 463 U.S. at 1125 (to determine whether a suspect is in custody for purposes of *Miranda,* the inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *Mathiason,* 429 U.S. at 495 (*Miranda* warnings are required where there has been such a restriction on a person's freedom as to render him "in custody").

Petitioner argues that the Colorado Court ignored the test for custody articulated by this Court in *Beheler* and *Berkemer* in deciding this and other cases. (Pet. for Cert. at 8.) To the contrary, Colorado has continued to faithfully adhere to the language of *Miranda* which definitively states the test to be applied, rather than deciding cases by reference to subsequent language which is merely a restatement of the original definition. Further, the Colorado Court's fidelity to the original language of the *Miranda* case has not, as Petitioner argues, resulted in an expansion of the situations in which compliance with *Miranda* is required. (Pet. for Cert. at 10.)

Additionally, there is a serious omission in Petitioner's brief which undermines Petitioner's arguments in this regard. Petitioner has ignored of the fact that this Court announced in *Berkemer* that the relevant inquiry for determining whether a suspect was "in custody" is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442. Moreover, Petitioner fails to inform this Court that the Colorado Court, in this case and its predecessors, has diligently and repeatedly applied this test in analyzing whether a particular situation amounted to "custody" for *Miranda* purposes. *People v. LaFrankie*, 858 P.2d 702, (Colo. 1993); *Haury*, 859 P.2d at 893; *People in the Interest of J.C.*, 844 P.2d 1185, 1189 (Colo. 1993); *Thomas*, 839 P.2d at 1178; *Hamilton*, 831 P.2d at 1330; *People v. Gennings*, 808 P.2d 839, 845 (Colo. 1991); *Probasco*, 795 P.2d at 1334; *People v. Horn*, 790 P.2d 816, 818 (Colo. 1990); *Lupy Trujillo*, 785 P.2d at 1293;

Julian Trujillo, 784 P.2d at 791; *People v. Cleburn*, 782 P.2d 784, 786 (Colo. 1989), *cert. denied*, 495 U.S. 923 (1990); *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988); *People v. Sandoval*, 736 P.2d 1201, 1203 (Colo. 1987); *People v. Harper*, 726 P.2d 1129, 1131 (Colo. 1986); *People v. Wallace*, 724 P.2d 670, 673 (Colo. 1986); *People v. Archuleta*, 719 P.2d 1091, 1092 (Colo. 1986); *Viduya*, 703 P.2d at 1286; *People v. Black*, 698 P.2d 766, 768 (Colo. 1985); *Thiret*, 685 P.2d at 203; *Johnson*, 671 P.2d at 961; *Parada*, 533 P.2d at 1123; *Algien*, 501 P.2d at 471. A more complete discussion of this test, *infra* Part II.B.2., will make it apparent that the Colorado Court has a long and steady history of complying with the spirit of *Miranda* and its progeny.

3. Other Federal Courts rely on definitions of custody that are functionally identical to the Colorado Court's definition.

Lower courts that have addressed the "custody" issue in the years since *Miranda* fall into three general categories. Some courts, like Colorado, have continued to rely on the definition for custody originally set forth in the *Miranda* opinion. These courts evaluate whether a suspect is "in custody or otherwise deprived of his freedom of action in any significant way." *E.g., United States v. Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied* 474 U.S. 1063 (1986); *McCown v. Callahan*, 726 F.2d 1 (1st Cir. 1984), *cert. denied*, 469 U.S. 839 (1984). (See also Pet. for Cert. at 11-12.) A second group examines whether there has been a "restraint on freedom of movement of the degree associated with formal arrest." *E.g., United States v. Bengivenga*, 845 F.2d 593, (5th Cir. 1988), *cert. denied*, 488

U.S. 294 (1988). (See also Pet. for Cert. at 10 n. 3.) This is an obvious reference to the language of *Beheler*. A third group of courts, eschewing any of the formalistic language of this Court's opinions, asks simply whether the individual being questioned would not be free to leave. *E.g., United States v. Long*, 866 F.2d 402 (11th Cir. 1989).

These lower courts are simply articulating parallel definitions of "custody," and there is nothing to indicate that application of the law to the facts in these cases has resulted in rulings that are inconsistent with the principles underlying *Miranda*. Surely this Court would have seized the opportunity to address this issue before now if misapplication of *Miranda* and its progeny was resulting in a "widespread" miscarriage of justice. Moreover, almost all lower courts apply an objective test[7] to determine whether an individual was in custody for *Miranda* purposes. The obvious conclusion to be drawn is twofold: first, the phraseology of the definition of custody, within certain bounds, is largely irrelevant since the lower courts' decisions demonstrate continuing fidelity to the principles of *Miranda* and its progeny; and second, it may well be more important to a correct resolution that courts apply the objective test than that they state the definition of custody in precisely the same way.

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7. *See infra* part II.B.3.

B. Colorado Like Most Federal and State Courts, Applies the Objective Test to Determine "Custody" for Purposes of Miranda.

1. The United States Supreme Court evaluates "custody" under the "reasonable person" standard.

Although the *Miranda* court defined what it meant by custodial interrogation, it set forth no specific test or standard to employ in applying that definition. Implicit in *Miranda* and its early offspring, however, is the notion that courts must make the determination on a case-by-case basis.[8] That notion first became explicit in *Beheler,* where the Court stated that "the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody.'" *Beheler,* 463 U.S. at 1125.

This Court first announced the standard to be applied in determining whether a suspect was in custody for purposes of *Miranda* warnings in *Berkemer v. McCarty,* 468 U.S. 420 (1984). There, the Court held that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 442. In a footnote, the Court stated its reasons for adopting this approach: "An objective, reasonable man test is appropriate because, unlike a subjective test, it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Id.* , n.35,

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8. See discussion supra part II. A., pp. 13-20.

quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967). That the objective test is the standard favored by this Court was only recently reaffirmed in its decision in *Illinois v. Perkins*, 110 S. Ct. 2394 (1990): "Coercion is determined from the perspective of the suspect." *Id.*, at 2397, *citing Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), *and Berkemer*, 468 U.S. at 442.

2. The Colorado Court evaluates "custody" under the "reasonable person" standard.

Like the United States Supreme Court, Colorado has held that "the determination of when custody has been imposed turns on the objective assessment of whether a reasonable person in the suspect's position would consider oneself deprived of his or her freedom of action in any significant way," *e.g., People in the Interest of J.C.*, 844 P.2d at 1189, "during a police interrogation in which the suspect was exposed to the risk of self-incrimination." *E.g., Julian Trujillo*, 784 P.2d at 791.[9]

Under the objective standard, neither the interrogating officer's subjective state of mind nor the suspect's mental state is conclusive on the issue of whether a reasonable person in that situation would have considered the interrogation to be

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9. The Colorado Supreme Court has restated this test in two other ways: (1) "[I]n determining whether a person is in custody, a court must consider whether a reasonable person in the suspect's position would consider himself significantly deprived of his liberty," Archuleta, *719 P.2d at 1092;* citing Black, *688 P.2d at 766;* Thiret, *685 P.2d at 193;* Johnson, *671 P.2d at 958, and (2) "The question of custody turns on an objective assessment of whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with formal arrest,"* Wallace, *724 P.2d at 673,* citing Viduya, *703 P.2d at 1286,* Black, *698 P.2d at 768;* Johnson, *671 P.2d at 961.*

custodial. *Hamilton,* 831 P.2d at 1330, *citing Lupy Trujillo,* 785 P.2d at 1293, *Cleburn,* 782 P.2d at 786. *Accord People in the Interest of J.C.,* 844 P.2d at 1190; *Black,* 1698 P.2d at 786.[10] Like the United States Supreme Court, Colorado has determined that the reasonable person standard is the controlling test because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Lupy Trujillo,* 785 P.2d at 1293, *quoting Berkemer,* 468 U.S. at 442 n.35 (*quoting People. v. P.,* 233 N.E.2d at 260; *Hamilton,* 831 P.2d at 1330; *Gennings,* 808 P.2d at 845.

"The issue of custodial interrogation is essentially a factual question that requires a trial court to consider the totality of circumstances surrounding the suspect's encounter with the police, then to assess the credibility of witnesses and to weigh their testimony, and finally to apply the correct legal standard to the facts as found by the court." *Hamilton,* 831 P.2d at 1331; *accord Haury,* 859 P.2d at 893, *citing Horn,* 790 P.2d at 818; *Johnson,* 671 P.2d at 962. While an inquiry into

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10. Cf. Harper, 726 P.2d at 1131 *quoting People v. Black,* 698 P.2d at 768, (testimony by a police officer that he would not have allowed the defendant to leave the scene of the accident has no bearing on the custody issue).

However, an officer's subjective intent is relevant in applying the reasonable person standard if the officer in any way communicated his intent to the suspect. *Cf. People v. Black,* 698 P.2d 766 (Colo. 1984)(police officer's subjective state of mind has no bearing on the custody issue where the officer does not communicate his intentions to the suspect); *accord People v. Harper,* 726 P.2d 1129 (Colo. 1986).

the totality of the circumstances surrounding the interrogation will be open-ended, the more prominent factors for consideration include the following:

> the time, place[11] and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

Julian Trujillo, 784 P.2d at 791, *quoting Thiret*, 685 P.2d at 203; *Accord Haury*, 859 P.2d at 893; *People in the Interest of J.C.*, 844 P.2d at 1189; *Probasco*, 795 P.2d at 1332; *Horn*, 790 P.2d at 818; *Lupy Trujillo*, 785 P.2d at 1292; *Cleburn*, 782 P.2d

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11. One of the factors set forth above has been the subject of more than the usual amount of discussion - the location of the interrogation. The place alone is not conclusive of whether questioning has occurred in a custodial setting. *Milhollin*, 751 P.2d at 50. Custodial interrogation requiring the giving of *Miranda* warnings does not necessarily refer to police station interrogation. *Id.*, *Johnson*, 671 P.2d at 961; *Parada*, 533 P.2d at 1122. Conversely, the fact that an interview takes place at a police station is not determinative of the custody issue. *Horn*, 790 P.2d at 818. Not all station house interrogations rise to the level of custodial interrogation. *Johnson*, 671 P.2d at 961. By the same token, however, the initial voluntariness of a person's presence at the station house does not preclude the determination that his presence thereafter is custodial in nature. *Horn*, 790 P.2d at 818; *Algien*, 501 P.2d at 470.

These decisions parallel this Court's decisions dealing with the location of the interrogation. The following cases found a non-stationhouse setting to be "custodial": *E.g.*, *Rhode Island v Innis*, 446 U.S. 291 (1980)(police car); *Orozco v. Texas*, 394 U.S. 324 (1969)(defendant's bedroom); *Mathis v. United States*, 391 U.S. 1 (1968)(prison cell during defendant sentence for an unrelated offense). On the other hand, this Court has recognized that not all stationhouse interrogations are "custodial." *California v. Beheler*, 463 U.S. 1121 (1983)(stationhouse interrogation was not a "custodial interrogation" which required *Miranda* advisement); *Oregon v. Mathiason*, 429 U.S. 492 (1977)(same).

at 786; *Sandoval*, 736 P.2d at 1203; *Wallace*, 724 P.2d at 723; *Black*, 698 P.2d at 768. *See also Milhollin*, 751 P.2d at 49-50; *Harper*, 726 P.2d at 1131; *Johnson*, 671 P.2d at 962; *People v. Rodriquez*, 645 P.2d 857, 860 (Colo. 1982).

Thus, a review of the pertinent Colorado law illustrates that Colorado is closely in step with this Court in its development of the standard to be applied in assessing whether "custody" exists. Although this Court has not explicitly held that the totality of circumstances surrounding the suspect's encounter with the police should be examined to determine whether the interrogation was "custodial," this Court has indicated in the past that "the circumstances of each case must certainly influence [such] a determination ...." *Beheler*, 463 U.S. at 1125. Additionally, this Court has engaged in a de facto "totality of circumstances" analysis in deciding "custody" issues. *See supra* note 8. Even in this regard, then, Colorado's mode of analysis is consistent with, if more explicit than, that applied by this Court.

3. The majority of lower courts evaluate "custody" under the "reasonable person" standard.

A survey of the lower courts indicates that the majority of federal appellate courts also employ an objective, reasonable person test to determine whether custody has attached for Fifth Amendment purposes. *See Fisher v. Scafati*, 439 F.2d 307 (1st Cir.), *cert. denied*, 403 U.S. 939 (1971); *see United States v. Hall*, 421 F.2d 540 2nd Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); *see Yount v. Patton*, 710 F.2d 956 (3d Cir. 1983), *rev'd*

on other grounds, 467 U.S. 1025 (1984); *see Steigler v. Anderson*, 496 F.2d 793 (3d Cir. 1974), *cert. denied*, 419 U.S. 1002 (1974); *Davis v. Allsbrooks*, 778 F.2d 168 (4th Cir. 1985); *see Moore v. Ballone*, 658 F.2d 218 (4th Cir. 1981); *United States v. Harrell*, 894 F.2d 120 (5th Cir. 1990), *cert. denied*, 498 U.S. 834 (1990); *United States v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988); *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988), *cert. denied*, 488 U.S. 294 (1988); *United States v. Macklin*, 900 F.2d 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 840 (1990); *United States v. Lennick*, 917 F.2d 974 (7th Cir. 1990); *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990); *United States v. Boucher*, 909 F.2d 1170 (8th Cir. 1990), *cert. denied*, 498 U.S. 942 (1990); *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989); *see United States v. Jones*, 630 F.2d 613 (8th Cir. 1980); *United States v. Manasen*, 909 F.2d 1357 (9th Cir. 1990); *United States v. Brady*, 819 F.2d 884 (9th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985); *United States v. Gillyard*, 726 F.2d 1426 (9th Cir. 1984); *United States v. Crisco*, 725 F.2d 1228 (9th Cir. 1984), *cert. denied*, 466 U.S. 977 (1984); *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983); *United States v. Leyva*, 659 F.2d 118 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978); *United States v. Irion*, 482 F.2d 1240 (9th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1973); *see Lowe v. United States*, 407 F.2d 1391 (9th Cir. 1969); *United States v. Pena*, 920 F.2d 1509

(10th Cir. 1990), *cert. denied,* ___ U.S. ____, 111 S.Ct. 2802 (1991); *Cordoba v. Hanrahan,* 910 F.2d 691 (10th Cir. 1990), *cert. denied,* 498 U.S. 1014 (1990); *United States v. Torkington,* 874 F.2d 1441 (11th Cir. 1989); *United States v. Long,* 866 F.2d 402 (11th Cir. 1989); *United States v. Phillips,* 812 F.2d 1355 (11th Cir. 1987). *See generally* David M. Nissman, et al., *Law of Confessions* §4:10 Table 4-1, at 100 (1985); J.F. Ghent, Annotation: *What Constitutes "Custodial Interrogation Within Rule of* Miranda v. Arizona *Requiring That Suspect Be Informed of His Federal Constitutional Rights Before Custodial Interrogation,* 31 A.L.R.3d 565, § 6 (1970); *16th Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1985-1986,* 75 Geo. L.J. 713, 827-828 (1987).

Many states besides Colorado also apply the objective test. *E.g., State v. Morse,* 617 P.2d 1141 (Ariz. 1980); *People v. Arnold,* 426 P.2d 515 (Cal. 1967), *overruled on other grounds by Walker v. People,* 763 P.2d 852 (1988); *People v. Lucas,* 548 N.E.2d 1003 (Ill. 1989); *State v. Fritschen,* 802 P.2d 558 (Kan. 1990); *State v. Gardner,* 509 A.2d 1160 (Me. 1986); *Myers v. State,* 240 A.2d 288 (Md. App. 1968); *People v. Lumley,* 398 N.W.2d 474 (Mich. App. 1986); *see State v. Palm,* 299 N.W. 2d 740 (Minn. 1980); *see Roberts v. State,* 301 So. 2d 859 (Miss. 1974); *People v. P.,* 233 N.E.2d 255 (N.Y. 1967); *State v. Torres,* 393 S.E.2d 535 (N.C.App. 1990), *rev'd on other grounds,* 412 S.E.2d 20 (N.C. 1992); *State v. O'Keefe,* 617 P.2d 938 (Or. App. 1980); *Commonwealth v. Marabel* 283 A.2d 285 (Pa. 1971); *State v. Hohman,* 392 A.2d 935 (Vt. 1978); *State v. Preece,* 383 S.E.2d 815

(W.Va. 1989); *State v. Koput*, 418 N.W.2d 804 (Wis. 1988). *See generally* David M. Nissman, et al., *Law of Confessions* §4.10 at 100 n.53 (1985); J.F. Ghent, Annotation, *supra*, § 6.

Clearly, this is the test which has gained the widest approval among the courts. Although a subjective test is supported by considerable logic,[12] the objective is more susceptible of proof. As in many other areas of law, courts have found the workings of an individual mind are too complex to enable the use of a truly subjective standard. Jefferson v. Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation*, 25 S.C. L. Rev. 699, 713 (1974). Under these conditions, courts have adopted a standard which at least approximates the proper result in the normal case, and one which can be proven with relative accuracy. *Id.* The objective standard is a reasonable solution to the problem. *Id.*

Contrary to Petitioner's argument, then, there is no "widespread confusion" among the lower courts, including Colorado, concerning when the requirements of *Miranda* are applicable. To the contrary, nearly all the Federal Circuit Courts of Appeal, and many state courts, including Colorado, apply the objective, reasonable person test first set forth in *Berkemer* to the determination of "custody" for purposes of

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12. The person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 Mich. L. Rev. 39, 99 (1968).

Miranda. Colorado is thus squarely in the mainstream in this regard. By urging this Court to examine whether "custody" should be evaluated with reference to "restraints of the degree associated with arrest" rather than the parallel language "otherwise deprived of his freedom of action in any significant way," Petitioner seeks to divert this Court away from the more appropriate inquiry of "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 422. In directing this Court to examine definitional language instead of the substantive test that is employed to effectuate this language, Petitioner disingenuously leads this Court in a direction that will generate, rather than curb, "widespread confusion" in this settled area of criminal law.

C. Petitioner's Proposed Definition of Custody Lacks Guidance and Unduly Limits the Applicability of Miranda Warnings.

Petitioner's argument that the controlling language for determining whether someone is in custody for purposes of *Miranda* is "arrest or restraints to a degree associated with formal arrest" suffers from another flaw. This phraseology tends to collapse the separate concepts of custody and significant deprivations of freedom originally articulated in the *Miranda* decision. *Yeager, supra,* at 15. However, the disjunctive use of the word "or" in *Miranda* demonstrates the Court's intent to create <u>two</u> types of restraint in which questioning by police leading to a confession would be presumed compelled if unattended by warnings and a valid waiver: "[w]hen

an individual is taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 68, *quoting Miranda,* 384 U.S. at 478 (emphasis added). This provision was not inserted into the *Miranda* opinion cavalierly; there are five separate references to the two types of custodial restraint in the majority opinion. *Id.* at 444, 445, 467, 477, 478. Despite this conjunctive construction, the Petitioner, in propounding its test for custody, requires of significant deprivations of freedom the characteristics of something which clearly they are not - settings of custody. *C.f. Yeager, supra,* at 68. Petitioner suggests, in essence, that courts evaluate only whether arrest or its functional equivalent is present. (*See* Pet. for Cert. at 11.) Several problems flow from this proposed shift in analysis.

First, the phrase "restraint on freedom of movement of the degree associated with formal arrest" provides no more guidance than "otherwise deprived of his freedom of action in any significant way." This language does not make *Miranda's* "bright line" any brighter. What is the functional equivalent of arrest? Does it involve a greater degree of compulsion than a reasonable suspect's perception that he or she is not free to go? *Yeager, supra,* at 15-16. Does it require a particular length or degree of restraint or intrusiveness of questioning? *Id.* at 16.

Second, and even more compelling, to reduce "custody" to arrest or its functional equivalent is to blur a distinction designed to establish a class of police-suspect encounters that

would fall short of actual custody but still command *Miranda* warnings. *Id.* [13] This definitional merger unduly limits the circumstances that could qualify as significant deprivations of freedom. *Id.* As a result, coercive police practices that occur in settings that fall short of a formal arrest become legitimized. Such an outcome betrays the intended scope of *Miranda* and its offspring.[14]

D. Petitioner's Suggested Definition of "Custody" for Fifth Amendment Purposes Inappropriately Relies on the Fourth Amendment Concept of "Arrest."

Petitioner argues that the Colorado Court, by alluding to the phrase "not free to leave," equates any "seizure" for Fourth Amendment purposes with "custody" for Fifth Amendment purposes. This was not the intent of the Colorado Court. The lower court simply noted, as one of the many factors that supported its finding of "custody," that Mr. LaFrankie was never informed that he was free to leave. *LaFrankie,* App. to Pet. for Cert. at C-8, C-9. "Whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation" is just one of numerous factors that the Colorado Court considers in making the "custody" assessment.[15] The Court did

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13. *Cf. Berkemer,* 468 U.S. at 436-37 (declining to establish class of restraint that qualifies as seizure for Fourth Amendment purposes but not as significant deprivation for Fifth Amendment purposes.)

14. *See supra,* n.6 and accompanying text.

15. *See supra,* p. 30.

not, in this case,[16] refer to "not free to leave" as utilized for Fourth Amendment purposes, as the standard for determining "custody" for Fifth Amendment purposes.

Moreover, Petitioner's contention that this Court should substitute the *Miranda* definition of custody -- taken into custody or otherwise deprived of his freedom of action in any significant way -- with the language of *Beheler* -- formal arrest or restraint on freedom of movement of the degree associated with formal arrest -- suffers from a pitfall which is the converse of that attributed to the lower court. The proposed definition equates "custody" or its functional equivalent for *Miranda* purposes, a Fifth Amendment determination, with the term "arrest" as it is defined for Fourth Amendment purposes. The logical extension of Petitioner's argument is that persons subjected to many Fourth Amendment detentions could never be in custody for purposes of *Miranda*. Such an analysis fails to recognize a subtle, yet significant distinction between Fourth and Fifth Amendment jurisprudence grounded in the values each constitutional provision advances. *Williamson, supra,* at 386. This distinction is that the determination of "custody" for Fifth Amendment purposes is based on an analysis of compulsion,[17] whereas Fourth Amendment seizures are concerned

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16. *But see People v. Johnson,* 671 P.2d 958, 962-62 (Colo. 1983)

17. In *Miranda,* this Court states that the privilege against self-incrimination is founded on a complex of values. *Miranda,* 384 U.S. at 460. Among them are the respect a government must accord to the dignity and integrity of its citizens, respect for the inviolability of the human personality, and the requirement that the government seeking to punish an individual must produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Id.* (citations omitted).

with deprivation of liberty and privacy interests.

As was stated previously, the element of compulsion is the key to the *Miranda* decision. *Id.* at 387. The Fifth Amendment prohibits the use of any practice or tactic that compels a person to incriminate himself or herself. *Id.* at 388 (emphasis in original). According to *Miranda*, the prohibited element of compulsion is present in all cases of in-custody interrogation. *Id.* *Miranda* therefore proceeds from the assumption that a significant deprivation of freedom of movement, together with police-initiated questioning, necessarily generates a form of prohibited compulsion.[18] *Id.* The suspect's state of mind, real or attributed, provides the factual predicate for the assumption that compulsion exists when a suspect is subjected to custodial questioning. *Id.* at 404.

The Fourth Amendment, alternatively, is based on concerns for deprivation of a suspect's freedom of movement, *Williamson, supra,* at 397, the privacy interests of persons detained, *id.* at 399 n. 116, and concern for personal safety and personal dignity. *Id.* at 403.

The Fifth Amendment concept of custody and the Fourth Amendment concept of detention further, at least in part, compatible interests. Both are premised to varying extents on

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18. Cases decided both before and after *Miranda* have held that other prohibited forms of compulsion, physical or psychological, may occur in addition to those flowing from the fact of in-custody questioning. The fact remains, however, that following *Miranda*, a person in custody necessarily and always, regardless of circumstances, in considered subjected to prohibited compulsion when interrogated, unless first properly warned of his or her constitutional rights. *Williamson, supra,* at 388-89, and authorities cited therein.

the assumption that significant restraints on freedom of movement implicate constitutional values beyond those inherent in the mere loss of that freedom. In the case of the Fifth Amendment, significant custodial restraints produce a form of prohibited compulsion to speak when questioned. In the case of the Fourth Amendment, significant custodial restraints maximize the government's evidence gathering potential. *Id.* at 404.

Although the values that underlie the concepts of custody and arrest are closely aligned, the analogy is not perfect. *Miranda's* concept of custody is predicated upon the belief that significant custodial restraints generate, in the mind of the suspect, a form of prohibited compulsion. *Miranda* makes sense only if, in deciding whether a suspect is in custody, an attempt is made to view the situation as it might appear to a reasonable person. *Id.*

On the other hand, in a Fourth Amendment analysis, where the issue often is whether a suspect was subjected to a *Terry*[19] type detention or instead was arrested, the state of mind of the suspect is not important, given the values that underpin the distinction between the two forms of seizure. The suspect's state of mind is irrelevant to the advancement of legitimate Fourth Amendment values. The Fourth Amendment guarantees freedom of movement and the attendant privacy rights. These guarantees thus operate as a check against unreasonable actions by law enforcement officials. A lawful *Terry* stop is not

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19. *Terry v. Ohio*, 392 U.S. 1 (1968).

rendered unreasonable simply because a "reasonable person" would believe that he or she has been arrested, or because the suspect is uncertain as to his or her fate during the period of the temporary detention. Anxiety simply is not a value recognized by the Fourth Amendment. Similar reasoning applies to the law of searches. A search of our papers, houses, and effects occurs when the police actually invade our privacy; the Fourth Amendment is not violated simply because we believe, perhaps reasonably so, that our houses, papers and effects are about to be searched or seized, or both. *Id.* at 404-405 (emphasis added).

Because the concepts of custody and arrest do not coincide in all respects, one subtle yet potentially outcome-determinative difference between the two must be recognized and implemented. The determination whether a *Terry* stop, because of the circumstances, crossed the threshold and became "custody" for *Miranda* purposes, but not an "arrest" for Fourth Amendment purposes, must be made with reference to the likely perception of a reasonable person. *Id.* at 405.

In his article, Professor Williamson sets forth two examples that illustrate when the divergence between *Miranda's* concept of custody and the Fourth Amendment's concept of arrest could become outcome-determinative. In Case One, upon reasonable suspicion a suspect is detained for a brief period in a manner that otherwise clearly would constitute a detention less than formal arrest, except that the detaining officer informs the suspect that he is under arrest. Although the circumstances might not otherwise dictate such a result, the

fact that the suspect was informed that he was under arrest means that he must be deemed in custody for *Miranda* purposes. The communication of the fact of arrest would have a profound effect on a reasonable person's view of the circumstances of custodial questioning that might follow. *Id.* at 406.

In Case Two, a suspect is detained under circumstances that constitute a valid *Terry* stop. His vehicle is stopped upon reasonable suspicion that it contains contraband. The stop is achieved when a uniformed officer, in a police car, with lights flashing, catches the suspect's speeding vehicle. The officer approaches the vehicle with his handgun drawn and orders the suspect out of the vehicle. The officer further instructs the suspect to assume a "spread eagle" position. Following a *Terry* frisk for weapons, the officer demands the suspect to produce his driver's license and vehicle registration. The driver produces his own valid license and a bill of sale for the vehicle in the name of another. In response to questions concerning the ownership of the vehicle, the suspect answers that it belongs to a friend. The officer advises the suspect that he will be detained until the arrival of a narcotics officer. At that point, the suspect becomes nervous, indicates that he would like to leave, and requests the return of his license. The traffic officer tells the suspect that he is not free to leave. Within fifteen minutes, the narcotics officer arrives and informs the suspect that he believes the vehicle contains contraband. The narcotics officer twice asks the suspect for permission to search the car. Both times, he

declines. The narcotics officer then tests the rear of the vehicle and, when it does not move, concludes that it is overloaded. The officer puts his nose against the trunk and says that he smells marijuana. When the suspect is asked directly whether the vehicle contains marijuana, he responds, "It's not mine. I was just carrying it for a friend." The narcotics officer opens the trunk and discovers a large quantity of marijuana. *Id.* at 406-407.

The facts of Case Two are, essentially, the facts of *United States v. Sharpe,* 470 U.S. 675 (1985), except that in *Sharpe* no questioning of the suspect occurred before the marijuana was discovered. In *Sharpe,* this Court concluded that the suspect was validly detained upon reasonable suspicion until such point as the narcotics officer detected the odor of marijuana. The issue remains whether the questioning of the suspect was permissible in the absence of *Miranda* warnings. *Id.* at 407.

If the issue of custody is determined with reference to the likely state of mind of the suspect, and not with reference to whether he was the subject of a *Terry* stop or a formal arrest, the suspect in Case Two surely would have felt the type of compelling environment described in *Miranda.* He was forcibly detained by two officers. Firearms were displayed, and the suspect was frisked. He was advised that a narcotics officer had been called to the scene and that he was not free to leave. He was detained under these circumstances for fifteen minutes and, upon the arrival of a narcotics officer, was twice asked to consent to a search of the vehicle. Finally, he was

specifically accused of driving a car that the police suspected -- confirmed by the odor -- contained marijuana and asked directly whether the car in fact contained marijuana. A more compelling environment outside *Miranda's* paradigm station house interrogation is difficult to imagine. *Id.*

The foregoing discussion demonstrates the intersection and potential conflict between the *Miranda* decision and Fourth Amendment doctrine. It is analytically expedient to conclude that an individual's freedom of movement is restricted in a "significant way" -- and thus is "in custody" for *Miranda* purposes -- when, but only when, the person is "under arrest." It is likewise convenient to assume that a suspect whose freedom of movement has been restricted only to the extent that the person has been subjected to a Fourth Amendment *Terry* stop has not suffered the type of significant restraints on freedom of movement required by *Miranda*. However, because the Fourth Amendment jurisprudence that defines and differentiates the concepts of stop and arrest is derived from values unrelated to those underlying the *Miranda* decision and the Fifth Amendment, Petitioner's proposed definition of "custody," which is more closely aligned with Fourth Amendment than with Fifth Amendment concepts, fails to adequately address the types of compulsion *Miranda* set out to remedy.

E. The Definity of Custody Propounded by Petitioner Fails to Recognize that Custody and Interrogation Must be Evaluated in Tandem in Determining the Necessity for Miranda Warnings.

Implicit in Petitioner's argument is the notion that a court must evaluate whether a person is in custody for *Miranda* purposes in a vacuum, divorced from any consideration of the interrogation component. The *Miranda* court, however, chose to give definition to the phrase "custodial interrogation," rather than defining "custody" and "interrogation" as discreet concepts. To the extent that subsequent opinions focus on the meaning of either "custody" or "interrogation" taken alone, it is because there is no question that the other component is present. *Perkins,* 110 S.Ct. 2394; *Murphy,* 465 U.S. 420; *Beheler,* 463 U.S. 1121; *Innis,* 446 U.S. 291; *Mathiason,* 429 U.S. 492; *Beckwith,* 425 U.S. 341; *Orozco,* 394 U.S. 324; *Mathis,* 391 U.S. 1.

The Court only recently reaffirmed this notion that custody and interrogation work together to generate inherently compelling pressures. In *Illinois v. Perkins,* 110 S. Ct. 2394 (1990), Justice Kennedy stated that "it is the premise of *Miranda* that the danger of coercion results from the <u>interaction</u> of custody and official interrogation." *Id.* at 2397 (emphasis added). "Questioning by captors, who appear to control the suspect's fate, may create <u>mutually reinforcing</u> pressures that the Court has assumed will weaken the suspect's will ...." *Id.* (emphasis added). In holding that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response, the Court noted that "[W]hen the agent carries neither badge nor gun and wears not 'police

blue,' but the same 'prison gray' as the suspect, there is no 'interplay between police interrogation and police custody.'" *Id.*, citation omitted (emphasis in original).

That it is the interaction of official questioning in a custodial environment that gives rise to the coercive pressures that *Miranda* addresses is explained as follows: "It is the impact on the suspect's mind of the interplay between police interrogation and police custody - each condition reinforcing the pressures and anxieties produced by the other - that, as the *Miranda* court correctly discerned, makes 'custodial police interrogation' so devastating. It is the suspect's realization that the same persons who have cut him off from the outside world, and have him in their power and control, want him to confess, and are determined to get him to do so, that makes the 'interrogation' more menacing than it would be without the custody and the 'custody' more intimidating than it would be without interrogation." *Yeager, supra,* at 4 n.15 (emphasis in original).

One author has considered the proposition that both the "custodial" and "interrogation" elements must be considered together in determining whether a particular situation gives rise to the need for *Miranda* warnings. *Yeager, supra*. One view of such a melding of the two elements might mean that a high level of interrogation must be considered in evaluating the legal consequences of an otherwise low level of custody, and that a high level of custody should be taken into account in the *Id.* at 49. For example, in a setting where one component is by

itself insufficient to warrant *Miranda* warnings but the other is highly compelling, the higher component may compensate for the "shortcomings" of the component that features a lower degree of compulsion. *Id. Miranda,* then, is required whenever both elements aggregately exert on a suspect a certain level of compulsion, even if one element standing alone is below that threshold. *Id.*

A second view posited by this author is that the Court's allusion to "interplay" may actually have envisioned a synergistic relationship. *Id.* "Synergy" describes how two forces, acting together, create a unified system in which each element acts in a manner unpredicted by the behavior of its parts taken separately. *Id.* at 49-50. Where interplay views each element as merely being added to the other, synergy views each element as augmenting the other. *Id.* at 50. Under either view, police, when imposing a severe level of custodial restraint on a suspect, excite in the suspect a heightened sensitivity to whatever interrogation techniques are used. *Id.* Conversely, a low level of custodial restraint affords police greater leeway in interrogating a suspect before *Miranda* warnings become necessary. *Id.* at 49-50.

If the concepts of "custody" and "interrogation" are viewed separately, as Petitioner's argument assumes, both elements must in each case reach a certain threshold of compulsion before *Miranda* attaches. The difficulty with this approach, however, is that it ignores the fact that it is the <u>interplay</u> of custody and interrogation that subjugates a suspect to the will of his

examiner. *Id.* at 48. When Justice Stewart wrote in *Rhode Island v. Innis*, 446 U.S. 291 (1980), that "'interrogation' ... must reflect a measure of compulsion above and beyond that inherent in custody itself," *id.* at 300, he recognized how "custody" and "interrogation" work together to undermine a suspect's will to resist police pressures. *Yeager, supra*, at 48. It is clear from the *Perkins* decision, discussed earlier in this section, that this Court has recommitted itself to an approach which examines the interaction of "custody" and "interrogation" in assessing whether *Miranda* attached in a particular situation.

III. THE COLORADO COURT APPLIED THE CORRECT LEGAL STANDARD IN SUPPRESSING RESPONDENT'S STATEMENTS TO THE POLICE, AND ITS FINDINGS ARE SUPPORTED BY COMPETENT EVIDENCE.

Under any rational interpretation of the United States Supreme Court's definition, the facts of this case support a finding of "custody." The Colorado Supreme Court found that the district court applied the correct objective reasonable person standard and considered the totality of the circumstances, including the purpose of the interview, the words used by the officers, the setting and duration of the interview, and the fact that Mr. LaFrankie was never informed that he was free to leave the interview room or terminate questioning. The district court's findings were found to be supported by competent evidence. The same result is reached under the analysis regardless of any perceived semantic differences in the definition of "custody."

The trial court cited many factors it found significant in reaching its conclusion. As to time, place and purpose of the encounter, it was done during working hours, in the office of Mr. LaFrankie's boss, (App. at p.18, l.19 through p.20, l.13.), and for the purpose of obtaining a confession. (App. at p.1, l.15 through l.18.) As to the persons present during the interrogation, only two police officers and the defendant were present. (App. at p.5, l.15.) The words spoken by the officer to the defendant included repeated statements to Mr. LaFrankie indicating that he was lying, (App. at p.23, l.13-17.), that the officers were trained to discern this, that he would flunk the polygraph test the officers would be administering, (App. at p.31, l.3-7.), that he would feel better telling the truth and that the judge would treat him better if he told the truth. (App. at p.28, l.6-25) The officers' tone of voice and general demeanor were characterized by the lower court as low-key and without threats, yet accusatorial. The length of the interrogation was about thirty minutes, (App. at p.10, l.18.), and the mood was accusatorial from the start and throughout the interview. (App. at p.24, l.1 through p.26, l.14.)

Relevant to whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation is that Mr. LaFrankie was removed from his personal work site by his employer, acting at the request of the police, and taken to the office of his boss where the door was closed behind him. (App. at p.128, l.19 through p.20, l.13.) Two police officers sat in close proximity to him, (App. at p.21,

l.15 through p.22, l.20.), and Mr. LaFrankie was never told he was free to leave or free to refuse to answer questions. (App. at p.23, l.20.) The trial court enunciated all of these facts as circumstances it considered in arriving at the conclusion that there was custody.

Petitioner argues that "this Court has repeatedly stated that custody requires significant restraints, which are to be measured in terms of the police domination associated with arrest." (Pet. for Cert. at 8). Even if one can discern a difference between "significant restraints" and "being deprived of liberty in a significant way," an examination of the factors discussed above illustrates that Mr. LaFrankie was placed in the type of incommunicado, police-dominated environment envisioned by *Miranda*.

The police domination of this situation could have been significantly reduced by any words or actions on their part which would have communicated to Mr. LaFrankie that he had some rights or some choices in this scenario. The officers never told Mr. LaFrankie that he was free to leave. There were no breaks in the interrogation. Mr. LaFrankie was obviously experiencing anxiety during this lengthy interview. (App. at p.10, l.22 through p.11, l.1.) But he was not given the opportunity to talk to anyone, to leave the room, or to have time alone to think about what was happening. Mr. LaFrankie was never given even a cursory advisement or hint that he had the right not to answer these questions. Instead, the tone was highly accusatorial, confrontational and disbelieving

throughout. When Detective Scott said, "Don't blow smoke at me, cause I'm going to find out, okay," (App. at p.26, l.8) the message conveyed was that the officers would stay and continue their interrogation until a confession was obtained. The message was also that Mr. LaFrankie was going nowhere.

Although a full analysis of numerous factors is critical, one important feature in this case cannot be understated: the fact that the interview took place at Mr. LaFrankie's place of employment, in the president's office. While his place of employment was arguably familiar with Mr. LaFrankie, here it was also the scene or the crime, and the employer was the victim of that crime. The Colorado Supreme Court noted the following about this aspect of the case:

> Although the interrogation by Officers Scott and Goeke did not take place at the station house, there can be few places more intimidating or potentially coercive to an individual than one's place of employment. This is especially true when the employee is first confronted in the presence of senior management, escorted to the president's office, interviewed while the door is closed, and never informed that he is free to leave. *See, e.g., United States v. Carter,* 884 F.2d 368 (8th Cir. 1989)(holding that a bank employee questioned by police in bank president's office was subjected to custodial interrogation); *United States v. Nash,* 563 F.2d 1166 (5th Cir. 1977)(finding custodial interrogation where suspect was taken to security office at his place of employment by his supervisor, interrogated by an FBI agent for 45 minutes with the office door closed, and was not informed that he had the right to leave the office); *United States v. Phelps,* 443 F.2d 246 (5th Cir. 1971)(interrogation custodial where police questioned suspect at his place of business); **cf.** *United States v. Dockery,* 736 F.2d 1232 (8th Cir. 1984)(police questioning of defendant at place of employment not custodial where defendant initiated interview and was told that she did not have to answer any questions, that she was not under arrest, and that she was free to leave at any time).

LaFrankie, App. to Pet. for Cert. at C-8, n.9.

The cases relied on by the prosecution provide a factual point of departure from this case. The *Berkemer* decision makes it clear that, although certain facts can turn a roadside stop does not rise to the level of "custody" - the roadside stop does not rise to the level of "custody" - the encounter is hardly incommunicado and police domination is low. In the *Beheler* case, the defendant himself initiated contact with the police by calling and reporting a crime, the police were invited to his home, he came voluntarily to the police station, and was told he was not under arrest. The *Murphy* case involved a request to the defendant to visit his probation officer, part of his regular routine as required by his status of being on probation. All of these cases turn on a common-sense determination of a reasonable person's perceptions of their relative power and freedom vis-a-vis the police.

In none of these cases was there a surprising interruption of normal life, initiated by the police, in which the suspect was thrust into a private interrogation, without any notification of the right not to be subjected to such interrogation. The difference is well stated by the trial court in this case, as follows:

> "I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out."

LaFrankie, App. to Pet. for Cert. at C-10. The type of lengthy,

closed door questioning that occurred in this case is not the limited, investigative inquiry contemplated in the *Berkemer* decision. On the facts of this case, a reasonable person would not be expected to figure out that he was free to leave, unlike the defendants in *Beheler* and *Murphy*.

Further, no policy reasons exist to support the type of police work in this case. Police are free to ask tough questions and interrogate in a confrontative fashion as long as people are aware of the freedom to choose - the choice to leave if free to leave, or the choice to decline questioning if not free to leave. This balances the power between private citizens and the police. Close calls on the issue of "custody" should encourage officers to give the advisement of rights. To hold otherwise would invite deception and abuse. Petitioner argues that some formal event such as the use of physical force or demonstration of authority must occur before a situation is deemed "custodial" for Fifth Amendment purposes. This ignores the more subtle forms of coercion which lie within the power of the police and which were illustrated in this case. According to Petitioner's argument, a police officer would be permitted to lure an unsuspecting person into a private, police-dominated environment and relentlessly accuse and question him without limitation, and, so long as no declaration of arrest, drawing of guns, or physical subduing occurred, the person would not need to be told they have any rights or freedoms. This does nothing to further the goal that statements be the product of an <u>intelligent</u> exercise of the privilege against

self-incrimination.

CONCLUSION

The definition of custody for purposes of *Miranda* propounded by Petitioner was not pressed or passed on in the Colorado courts. Therefore, this Court should refuse to exercise its jurisdiction in this case.

Moreover, the Colorado Supreme Court correctly applied the appropriate legal standard -- the "reasonable person" test, announced by this Court in *Berkemer* -- in making its determination that Mr. LaFrankie was subjected to "custodial" interrogation and therefore should have had the benefit of *Miranda* warnings. Because the Colorado Court's decision conforms with principles previously articulated by this Court, and because its decision is supported by competent evidence, the State's petition for writ of certiorari should be denied.

DAVID F. VELA
COLORADO STATE PUBLIC DEFENDER

_____
Linda Perkins Cooke
Deputy State Public Defender
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on _____, I served the foregoing document by mailing same through U.S. Mail to opposing counsel Bill Nagel, Boulder District Attorney's Office.

_____

(3)

APPENDIX

DISTRICT COURT
COUNTY OF BOULDER
STATE OF COLORADO

Action No. 92CR601

REPORTER'S TRANSCRIPT

November 30, 1992

The People of the State of Colorado,

People,

vs.

L. D. LaFrankie,

Defendant.

The Motion's Hearing in this matter commenced on November 30, 1992, before the HONORABLE JOSEPH J. BELLIPANNI, Judge of the District Court in and for the County of Boulder, State of Colorado.

For the People: Mr. Steve Louth

For the Defendant: Mr. John Lucas

THE COURT: 92CR601, People vs. Leslie LaFrankie.

MR. LOUTH: Steve Louth on behalf of the people. Mr. Lucas represents Mr. LaFrankie who is here and Mr. Lucas is out in the hallway.

MR. LUCAS: John Lucas for Mr. LaFrankie.

THE COURT: I don't have any motions for which there would be a hearing. What motions are we going to hear? Are there statements?

MR. LOUTH: Yes, there are statements.

THE COURT: Are you ready to proceed?

MR. LOUTH: Yes, I would call Officer Scott.

Having been called as a witness and after being duly sworn, the witness testified as follows:

THE COURT: Please be seated, state your name and spell your last name.

A My name is Joe Brian Scott, Police Officer for the City of Longmont.

BY MR. LOUTH: DIRECT EXAMINATION,

Q Officer Scott, what are your duties for the police department in Longmont?

A I am the lead detective in the forgery and fraud department in the investigations section.

Q On April 10, 1992, did you investigate a theft that occurred at Hi-Tech Manufacturing Company in Longmont, Boulder County, Colorado?

A I did.

Q And what was stolen from that business?

A A computer, a number of peripherals related to that computer and some computer memory chips.

Q And approximately when did that theft occur?

A In late March and early April of this year.

Q What did you do on the 10th of April of this year as far as investigating the theft?

A I spoke to some of management personnel at the facility and then interviewed the suspect, Mr. LaFrankie, seated at defense table in the purple coat.

Q Okay and what did the management tell you?

A They told me that they had a number of items disappear, most significant was initially the computer and related peripherals as well as a number of computer chips, memory chips. They suspected Mr. LaFrankie because he had access and because he had approached personnel advising whether they might know where the computer might be.

Q Did you determine Mr. LaFrankie was an employee of that company?

A Yes, he was an employee.

Q Okay, when you arrived at the business on the 10th of April, where was Mr. LaFrankie?

A He was on the ground floor on the west end of the building doing whatever it was he did.

Q Okay and did management take you to him or did they go get him?

A Well, we went down to that location and I waited a little bit down the hallway or in a room while management personnel contacted him and escorted him upstairs.

Q Okay and were you already upstairs?

A No, we followed them upstairs.

Q And who is "we"?

A I went to the location with Detective Goecke, also a Longmont Police Officer.

Q And when you followed them upstairs, where did they go to?

A To the main administrative area of the business which is on the top floor.

Q Okay, are we talking about a very big business, could you describe that for the Court?

A I think it has something around 100 employees, it's not that large of a building.

Q Okay and did you meet with Mr. LaFrankie?

A Yes, I did.

Q Describe how you made contact with him?

A We got up to the office of that location. I identified myself and Detective Goecke and I asked Mr. LaFrankie if he had a few minutes to talk to us and he said he would be willing to talk to us, he wanted to get the matter

straightened out.

Q Obviously when the manager made contact, he said something, are you aware of that conversation?

A No.

Q Okay and describe the room where you met Mr. LaFrankie at?

A The room in which the interview was conducted was the president's office, a very large office, well lit with one desk and several chairs in it.

Q Okay and after Mr. LaFrankie indicated that he did have a few minutes to talk to you, did the manager stay in the room?

A Well, they we asked for a place to speak and we then went into that office and they left.

Q Okay, so who was left in the office?

A Myself, Detective Goecke and Mr. LaFrankie.

Q Okay. Did you have any indication as to how long Mr. LaFrankie had been working at that business?

A My impression was it was up to several months but that is all.

Q Okay and how was Mr. LaFrankie dressed?

A Similar to what he is wearing now, that sort of clothes.

Q Okay and how are you and Detective Goecke dressed?

A The way I am right now.

Q You did, of course, identify yourselves as police to him?

A Yes.

Q Was that prior to asking him if he had a few minutes to talk with you?

A Yes.

Q What was the defendant's mood like when you first made contact with him?

A He was fine, he was perhaps a little apprehensive, that's all.

Q When you asked him if he had a few minutes to talk with you, did you tell him that he didn't have to talk to you?

A I don't know if I said that but I phrased it as a very open question, "do you have a few minutes to talk to me?"

Q Okay and did you sit down for the interview?

A Yes.

Q Was everyone in the room seated?

A Yes.

Q How far away was everybody, approximately?

A Oh, from myself to the stenographer's position, I guess that is five or six feet.

Q Was there anything between you and the suspect?

A I don't believe so.

Q And explain to the Court how you began the interview?

A Well, the first thing I did was I had a tape recorder in my pocket. I turned it on and then I identified myself again to him and I identified Detective Goecke and I explained why we were there again.

Q Okay, did you tell the defendant that you had a tape recorder in your pocket and you were recording the entire--

A No.

Q And after you had the tape recorder turned on--well, let me back up, did you tape the interview?

A Yes.

Q And do you have that tape here today?

A Yes.

Q After the tape is turned on, how did you begin the interview?

A I said my name is Lee Scott, this is Detective Goecke. I explained to him essentially why we were there, we thought he had information that we would be interested in in regard to a theft that had taken place at the business.

Q Did you ever give the defendant Miranda Warnings?

A No, I did not.

Q Okay, how did he respond after you identified or introduced him to Detective Goecke and yourself again?

A He was pleasant.

Q How did he respond after you said that you thought that he might have some information that you were interested

in?

A He indicated that he had purchased a computer at a garage sale and I explained to him what I felt were some inconsistencies in his statement to management because he had originally told management he had bought this computer or that he was aware of this computer and I explained to him the inconsistencies that I saw in that possible statement and we discussed it for several minutes.

Q So, he mentioned at the outset of the interview you were investigating a theft of a computer?

A Yes.

Q Did he get that information from you?

A Well, we told him about it but he knew what we were talking about, he knew it was about a computer that was at his house.

Q Okay and specifically what was his explanation as for as having the computer?

A He told me that initially that he had purchased the computer for $200.00 at a garage sale, I believe he said three weeks before and that he just thought it might be conceivably the one that was stolen from the business.

Q And did he indicate why he thought it might be conceivably the one from the business?

A He just thought it might be.

Q Okay and how did you respond to that?

A We discussed it at some length, including the probabality of him being, of 100 employees at the business, going to one of the enumerable garage sales in Longmont and finding exactly the computer that was stolen from the company on that day and I expressed the opinion that I didn't feel that was a very likely proposition. I told him I thought he probably would win the lottery first. We discussed that back and forth. As I said, he was apprehensive and he got a little more apprehensive as we talked. He was concerned about what might happen and I told him it wasn't up to me what happened. I explained that I thought perhaps a mistake might have been made here, mistakes can do. I admit I had made mistakes in the past as had Detective Goode and that one thing to do was to rectify a mistake rather than compound it by lying if there was an issue to that effect.

Q Did you ever make any promises to him as to what would happen if he did confess to stealing the computer?

A I told him that what eventually happened was not up to me, it was up to the Judge at some point in time. I did tell him that with one exception, regardless of what he told me, he would not go to jail that day. I said that if he did confess to murdering Mother Theresa, he would probably go to jail for that but other than that, I didn't see him going to jail that day.

Q At what point of the interview process did that

conversation come out as far as indicating to him that he was not going to be jailed that day unless he confessed to basically murdering someone?

A Oh, the middle to the late half of the interview, after he expressed some concern about what might happen to him in regard to this matter.

Q Did that conversation come out prior to his confession?

A Yes.

Q Okay, and the defendant eventually confess to stealing the computer?

A Yes.

Q And do you recall at what point of the interview he confessed?

A I believe it was virtually at the end of it.

Q So after all of the interview?

A Just before he left to go to his house.

Q Okay, now, how long did the interview last then?

A Thirty minutes.

Q And how would you describe the defendant's mood during and throughout the interview?

A He was calm but he was clearly nervous and apprehensive. His mannerisms were such that you would expect from someone who might not be telling you the truth. He had difficulty looking us in the eye, was figiting and moving

around. He kept asking around questions.

Q Around questions, could you explain what you mean by that?

A Well, instead of answering the question directly, he would sort of be asking something off on a tangent.

Q Is that how you got on the conversation of whether he was going to jail or what would happen if he confessed? Was it in response to a question?

A It was in response to a question he asked.

Q Okay, emotionally, how was he throughout the interview?

A He was quiet, quiet, he seemed very thoughtful about his answers and the questions we made to him. It was a very slow, low-key exchange of opinions for a significant part of the interview. I told him a number of times I didn't think he was telling me the truth and I thought he had knowledge of this theft and told him that it's possible he might not have done it but in my estimation, he at least knew who did.

Q And how did he respond to that?

A He said he didn't take it.

Q What eventually brought out his confession?

A I am not sure.

Q Okay, well, did he ask you many questions?

A Oh, a number of them. I couldn't tell you how many. It was a give and take conversation, our expressing our

opinion, explaining to him we thought eventually we would find out anyhow and I know I told him a number of times I could understand if someone made a mistake, pressures can be significant on someone and cause them to make bad decisions and that the important thing was to rectify that if that was the case.

Q Mr. [redacted], did you ever indicate to him what evidence you had or give him a synopsis of the evidence you had prior to [redacted]?

A [redacted], we discussed the fact that he had come to the company and we wanted more in the company-- before anyone inside the company knew about the theft in the first place.

Q [redacted] how he came to be up to the company?

A [redacted] had requested management personnel to tell them where he might know where the computer was at before anybody else, the police, the media, vice-president, I guess, knew about it and came to us and we had knowledge in the company that was going on and [redacted] already come to the company and discussed [redacted] he might know where it is.

Q Okay.

A We also discussed the fact he had access to the location of where the computer was taken.

Q So, you didn't make any mischaracterizations of evidence as far as indicating to him that you knew he had taken it?

A I stated several times in my opinion I believed he had been involved in the theft. I don't believe I ever told him we had proof beyond a doubt he did it.

Q Did you ever indicate what that opinion was based on?

A It was based on what I felt were the inconsistencies of his statement, the information with regard to him contacting the company about the computer. During the interview, we discussed his finances. He didn't make a lot of money there. He allowed me to look at his checkbook. At the time he purchased the computer, he had $1.00 in the bank and I asked him why he spent $200.00 on a computer when he doesn't have any money in the bank for food and he told me well, I got food stamps and we talked about that back and forth and I expressed my opinion I didn't think someone would buy that computer when someone had that much difficulty putting food on the table for their children.

Q And is that why you asked him if you could look at his checkbook?

A Yes.

Q How did you ask him that question?

A "Would you mind if I look at your checkbook" and he said, "no" and he showed me his checkbook. I then looked through his register, the running balance he was maintaining in the account, the checks he was writing and I think the highest

balance I saw on there was about $300.00 between April 1 and the date of the interview.

Q Okay, did the defendant ever ask you to terminate the interview?

A No, he did not.

Q Did he ever ask to leave?

A No, he did not.

Q Approximately, for the record, what age is the defendant?

A I would say he is approximately in his mid 20's.

Q Okay, and are you familiar with his educational background?

A I couldn't speak to a specific educational background. He was working for a high-tech firm and he does know how to use computers, that was, in fact, stolen in this case. He was in fact, altering the computer's components, upgrading it as he explained to me later from what it was when he took it. It's not an occupation, if you will, for somebody who is totally uneducated.

Q Were you and Detective Goecke armed that day?

A Well, I was, I assumed Pat was, I don't know.

Q Did you ever show or did you wear your gun on the outside of your plain clothes?

A No, it's inside my coat.

Q Okay and to your knowledge, did you ever expose

that?

A Not intentionally, no.

Q Did Detective Goecke?

A I never saw her gun there.

Q Okay, now, you know Mr. DaFrankie from a couple years earlier; don't you?

A Yes.

Q Okay, how do you know him?

A The last time I arrested him for fraud by check.

Q And how was that case disposed of?

A I believe we got some sort of deferral or probation.

Q Okay, do you know what year that was in?

A The case had a 97 case number. I am assuming that is when it happened.

Q Were you the arresting officer in that case?

A Yes.

Q Do you have any recollection of the case specifically?

A I interviewed him at that time about his case as well. I don't remember a lot about it but I do remember I did interview him.

Q Other than the fraud by check probation, do you have any other knowledge of his criminal background?

A I did check the Colorado Crime Information Center and found that he had previously been arrested and convicted

for perjury in Adams County.

Q Do you recall what year that was?

A I think it was 1990.

Q Okay, at the end of the interview which you said lasted approximately 90 minutes, what was the defendant's mood like at that point?

A I think he was relieved. The impression during the entire time I was interacting with him was he really wanted to tell me about it but he was very concerned about what might happen to him.

Q Okay and he was then free to go. Do you know if the defendant was on the clock or off the clock as far as getting paid?

A Well, I don't know when he went out. I don't know whether he was or not.

Q What time?

A 3:30 or 4:00 in the afternoon, I believe.

Q Do you know what time he normally got off work?

A No.

Q After he confessed, what did you say to him?

A We had previously discussed searching his house for the computer and we confirmed he was still willing to allow us to do that and then we left the business. He drove and we followed him to his house.

Q He drove in his car and you drove in your car?

A Yes.

Q You met him at his house?

A Yes.

Q And did he-- well, what happened there?

A He took us to the kitchen-- first of all, he signed a consent to search and he took us to the kitchen and there was the computer and most of the other parts to the computer and he also had some other company property there of-- some sort of test board or something and we did not find any of the computer memory modules at all.

Q Did he ever admit to taking anything other than the computer?

A No, not as far as what all he took was the computer.

Q Did he describe how he had taken that computer?

A He picked it up and walked out the door with it.

Q That is how he stated--

A Yes, sir.

Q After you got the computer at his house, what happened?

A We gave him a receipt for the items we took. I think we got a printer monitor and some other stuff and made arrangements for him to meet us later at the police department which he did.

Q Later that same day?

A Yes.

MR. LOUTH: Your Honor, no further questions.

THE COURT: Mr. Lucas?

BY MR. LUCAS: CROSS-EXAMINATION,

Q Detective Scott, do you have a copy of the transcript of that interview?

A With me, no.

Q With you right now, do you?

A No.

Q Okay, if I can approach. I will mark this as Defendant's Exhibit 1 for the purposes of this hearing. May I approach? Do you recognize this as a transcript of the-- a 17 page transcript of the interview that you did with Mr. LaFrankie?

A Yes.

Q Okay and we will say you had the tape here; is that correct?

A Yes, sir.

Q Okay, now when you went down the production floor, how many of you went down there to approach Mr. LaFrankie? You said management, how many people were there?

A I think just one guy.

Q You and Detective Goecke and one guy were following along?

A We went down and-- he showed us where we were and we

went down further into the room, oh, maybe as far as from here to the back of the room and stood there while he went in and talked to him.

Q So, he goes and talks to him and you are standing away and then he brings Mr. LaFrankie over to your office?

A No, he took him up the stairs and we followed him.

Q So, you are at some distance away, about the distance of the Courtroom away and then they walk over to you and then you walk further up the steps and down to the office; is that correct?

A No, they walked-- we were down there. They walked this way away from us and we followed them.

Q Then you followed and did you get real close to them when you were following them?

A I'd say close to reasonably close, I am not sure.

Q The last the person that went and got Mr. LaFrankie, was he the guy who owned the place?

A I think that is who it was, I am not sure. It wasn't the person that filed the initial complaint.

Q Pardon?

A It wasn't the person that filed the initial complaint.

Q He took you up to his office, to use his office?

A First, we went over to the administrative office area and outside the offices, we identified ourselves to Mr.

LaFrankie and told him why we were there.

Q And you said what to him at that point?

A I asked him if he had a few minutes to talk to us and I told him who we were.

Q And he said, yes that is okay, he would talk to you?

A Yes.

Q And that is all the conversation that took place?

A That is essentially-- we told him what our names were and about this computer and then there was a little discussion between myself and the company representative as to where we could conduct an interview because we wanted some place relatively quiet and we ended up being in the owner's office.

Q Okay and then Mr.-- did Mr. LaFrankie tell you when you were interviewing him he was concerned over losing his job over this?

A I believe he mentioned that, yes.

Q He did?

A Yes.

Q Okay and did you identify yourself only after you got into the office or did you identify yourself in the outer area first and then you went--

A I believe we identified ourselves in the outer office and then identified ourselves again on the tape recorder in the office.

Q Once you got into that office was there any other conversation done that doesn't appear on the transcript?

A I don't believe so.

Q Okay and the boss whose office this is is the alleged victim in this case; is that correct?

A Yes.

Q And can you again-- you said something about it being large or what, can you tell us how big that room is?

A Oh, about -- I'm not -- this much of this front area, I suppose. It was around 15 feet by 15 feet, there are windows on two walls.

Q Okay, one of the windows overlooks--

A One looks out west toward the mountains and the other looks south.

Q There will be six in this area-- where did Mr. LaFrankie -- sit in this 15 or 16 area?

A Well, I'll -- I'll move these chairs over about here.

Q Over by-- if we are using-- there is a model over by the witness stand.

A In this area, one chair was facing toward this room. that would be the north and then there were two chairs facing each other, one facing north and one facing south.

Q Okay and that is where you and the detective sat were in those two chairs, you and the other detective?

A Mr. LaFrankie sat in the north chair facing south.

Pat, I believe, sat in the chair facing in this room which would be north and I sat in the one facing north. Did I get that right? He was across from me and next to Pat.

Q So, you were sitting about six feet away from him; is that what you testified?

A Four to six feet, I guess.

Q Four to six feet and how about Pat, how close was Pat?

A She was sitting next to me and next to him so she was probably a couple feet away from him?

Q Okay, did the [illegible] come into the room at all, anyone else besides the [illegible] and you came in?

A Yes, after the interview, Mr. LaFrankie wanted to make a [illegible] to the [illegible].

Q Okay so [illegible], anytime during the interview did anyone [illegible] out?

A I don't recall anyone coming in, nobody came in and stayed.

Q Was the door closed?

A I believe so.

Q How did people move throughout the interview? Did this interview take a long time? Did anyone move, you know, out of their chairs?

A Mr. LaFrankie fidgited quite a bit.

Q But he didn't get up out of his chair?

A No.

Q Now about you or Detective Goecke? Is it Goecke or Goeke?

A Goecke.

Q Did either of you get out of your chairs?

A No.

Q Did either one of you lean toward him to try to drive a point home? Were you leaning or gesturing towards him?

A I am not -- I did. I would lean forward.

Q Do you recall you leaning in to him because you had kind of a heated exchange with him sometimes; didn't you?

A Well--

Q You called him a liar several times; didn't you?

A I suggested that he wasn't telling the truth.

Q You told him several times, "I know you are lying, I know you are lying," didn't you?

A I believe I said I believe you are lying.

Q How long did this thing last, about 30 minutes?

A Yes.

Q Did you ever tell him that he is free to leave or not in custody?

A No, I didn't.

Q Now, we went through this before, he initially denies taking the computer right off the bat; right?

A Yes.

Q And he continues to deny that throughout the interview until the 17 pages-- I guess it's about page 14 or 15 that he finally-- I think it's page 15 where he finally says something about that?

A I am not sure which page it is but that could be approximately right.

Q Okay and then you asked him to search his house on page two here near the top and he tells you-- you say, "do you mind doing that" and he says "no"; is that right?

A Yes.

Q Now, this interview-- you could characterize this interview as confrontational from the start; is that right? This is highly confrontational with him right off the bat; isn't it?

A No.

Q But the first thing out of your mouth you are telling him that you think he stole the computer, right off the bat before he says anything on this tape; is that right?

A I don't think I accused him of stealing it.

Q Well, okay but first-- after the introduction, you say who you are and then you say that people-- you say, "you just here to rectify mistakes when you figure out that it's a mistake," right? You tell him that kind of right up front?

A Yes.

Q And then you say, "you already made statements to people indicating knowledge of the incident before anybody else

would have told me about it and nobody in the plant except the president and the general manager knew the computer was gone and you come up and tell them how to find a computer at a flea market," is that right?

A That is correct.

Q And you tell him a little later down in that first page, you say to him, "Based on information that I have, it really leads me to believe that you are involved in this."

Is that correct?

A That is correct.

Q And you told him that your major goal -- sort of at the beginning of the interview, you told him your major goal is to get the computer back; is that right?

A Yes, I did tell him that.

Q You don't tell him your major goal is to solve a crime or something, you tell him your major goal is just to get the computer back; right?

A It's all part and parcel of the same thing.

Q You noted -- you testified earlier how Mr. LaFrankie was calm and yet nervous. I want to ask you a couple of questions about that. Right off the bat on page two, you tell him he looks as nervous as a cat on a hot tin roof; right?

A That is about halfway down the second page.

Q And I know you don't want to call this confrontative, don't you say to him right on the second page,

"Listen to me, Ben, don't blow smoke at me, cause I'm going to find out, okay?"

A Yes.

Q Don't you say that to him?

A Yes.

Q And don't you say it in that kind of voice?

A What kind of voice?

Q Like confrontative, "Listen, Ben, don't blow smoke at me, cause I'm going to find out," right?

A I'm not. I don't feel it was confrontative.

Q And you felt that you are going to be able to identify [illegible] taken from the store, is that correct-- or from [illegible], correct?

A Yes.

Q And you're going to have some questioning about polygraph tests. So you're saying this would be-- I am referring to page three, the lower part of page three that Officer Goecke says something to the effect that she knows he would fail a polygraph, is that right? She says, "We are trained specifically to be able to tell and I can tell from here?"

A It does say that.

Q Okay and during this conversation, Detective Goecke says that, "I can tell if you have been lying and you look like a poster boy for lying," that kind of thing?

A I believe there is a word-- remarks to that effect.

Q Referring to page five of the transcript, you were talking earlier-- this relates to something you were talking about on direct, there is an exchange here where you start talking to him about what a Judge would do with a person who admits that they did something wrong versus a person who maintains that they didn't. Do you recall that?

A I believe I asked him to put himself in the position of the Judge, "What do you think a Judge is going to think when somebody comes in and admits they made a mistake versus somebody comes in and denies it when all the facts point to them?"

Q And you say something to him, "Do you think the Judge is going to hear you got it at a garage sale? He's going to say, Ben had access at work." Do you recall that exchange?

A Part of the tape is not understandable but there is a statement, "Do you think he's going to hear you got it at a garage sale" He's going to say, Ben had access at work" and the non understandable portion, "What do you think is going to happen to you? What makes sense to you?"

Q And there is something that is not understandable and Mr. LaFrankie responds and then Officer Goecke says, "Do you want a Judge" and something else that is not understandable and Mr. LaFrankie says, 'no, I don't." Is that right?

A Yes.

Q Now, do you recall what Officer Goecke says at that point?

A I think it was something along the lines of, "do you want a Judge to think you are a liar."

Q Okay and then can you read-- this would be the last question on this page, can you read the next statement you have there, the paragraph about what you are telling him about the stuff-- about what a Judge might do or not?

A "If you were the Judge and you had to"-- not understandable-- "and one of them says, I made a bad mistake. I did something I shouldn't have"-- not understandable-- "and I did it and I'm sorry or when you have somebody come in and say, I don't know where that computer came from. I don't know how it got there. I bought it from some guy and it turns out you"-- not understandable-- "You're the Judge. You tell me. How are you going to respond to that? You're the Judge who is going to-- I'm going to look at that if I'm the Judge and I'm going to say, I think he got the message. He maybe needs a break. He didn't get the message. What's he going to say about the guy who did get the message?"

Q Did he say something to the effect that the Judge could look at somebody who confesses and say, "I think he got the message and maybe needs a break" is that right?

A Yes.

Q Okay, now, let me go back to the polygraph for just a moment and ask about a couple other aspects. Later on in that same page you say to Mr. LaFrankie, "What happens when you get the polygraph done? What's it going to say?" Do you remember that?

A Yes.

Q And he says, "I don't know" and you say, "I do." Is that right?

A Yes.

Q And then there you talk about a polygraph later on page eight. I'll just refer you to that where you say-- the middle of page eight, "When we put you on a polygraph, by your own admission, you're going to fail it cause you're lying. I can tell you're lying. You're sweating like a stuffed pig right here, okay?" Is that what you said to him about the polygraph?

A I said to him about his appearance.

Q But you say, "When we put you on the polygraph, you're going to fail cause you're lying." Is that right?

A What I say is, "When we put you on a polygraph, by your own admission, you're going to fail it cause you're lying. I can tell you're lying. You're sweating like a stuffed pig right here, okay?"

Q Let me ask you about some other questions regarding what is going to happen to Mr. LaFrankie. Referring you to the

top of page seven, you indicate to him, "So, it's not as bad a mistake as it looks and you're not stealing"-- not understandable-- "Okay. So, we're just talking about a little mistake here." Is that correct?

A That is correct.

Q And then again later on you make some reference to how well he is going to be treated on page 10 when you asked him if he was on probation; do you remember that?

A "Are you on probation right now?" His answer, "not right now." "So you don't have to worry about that?" Then it's not understandable.

Q And then he says, "It's done. It's over with" and you say, "So you don't have anything to worry about?" His answer is, "No." Is that correct?

A Correct.

Q Did you ever tell Mr. Zaremski that-- you got this thing that keeps beeping up and you say, "When we put you on the polygraph." Do you ever tell him that you really can't make him take a polygraph? Do you ever say that?

A He said, "We want you to take one."

Q Well, you say, "When we put you on the polygraph." Did you ever tell him that you can't make him take a polygraph?

A I believe earlier I asked if he would be willing to and he agreed to do that.

Q Okay. It seems like the first part you are talking

about that is on page three where the first time a polygraph is mentioned is not you asking if he would take one but that is the part where you say, "What would happen if we put you on a polygraph right now" and officer Goecke essentially says, "I know he is going to fail. I can tell from here, we are trained specifically to tell." Is that right?

A You are right.

Q So, he doesn't really say, "I would be willing to take a polygraph?"

A Right.

Q Okay. Let me ask you about something about the tone of voice in one of the exchanges we have here. I refer you to page eight on this transcript, if I may. You are talking to him and you are telling him, "if you made a mistake, we need to get it out on the table now." He says, "That's what I'm trying to do. 'If it's a stolen computer, yes, I've made a mistake of purchasing a stolen'-- did you interrupt Mr. Gutfrankie there?

A Okay, you are talking about page eight?

Q Yes, about two thirds of the way down, he is saying, "If it's a stolen computer, yes, I've made a mistake in purchasing a stolen-- and do you recall interrupting him there?

A That is the way the text reads. I don't recall but that is the way the text reads.

Q Can you read the next four lines what the responses

are with you and Officer Goecke?

A He makes this statement and I then say, "Ben", there is a pause, Detective Goecke then says, "No, no, no, no, no." I say, "Ben"-- there is another pause. Goecke said, "Ben's not going to say."

Q "Ben's not going to say," it looks like?

A "Ben's not going to say," correct.

Q Now, when this is happening, there is some-- there is some increase in confrontation with Mr. LaFrankie. At this point, your tone of voice is becoming stronger with him; is that correct?

A [illegible]

Q You're not going to say, "Ben, no, no, no" and "Ben" and "Ben is not going to say" but through none of that you never changed your voice is just flat and normal and no worse or [illegible]

A It would be as normal and soft as ever.

Q And then you tell him that his story about buying this at a lottery-- or at a garage sale is so unlikely that he would have a better chance of winning the lottery; is that correct?

A That is right.

Q And you tell him that to your knowledge the chance of winning the lottery is one in 5.2 million and you tell him easily the odds of buying that stolen computer at a garage sale

are much worse than that; is that right?

A Yes.

Q This part where you start talking about being the Judge again or what a Judge would do again and I want to reference you to that, it's on page 13, kind of the middle of the page, the longer paragraph that you talk about-- can you find that on there?

A Yes.

Q Okay and don't have you got-- what do you say, beginning with the words "If you were the Judge" can you tell the Court what it is that you say, the rest of that paragraph and Mr. Lafyatis's response?

A I think it has to be taken in context and you have to understand the whole statement I said.

Q Read the whole statement, that is fine.

A I can understand that, Dan. I can understand being real nervous. I can't tell you what the Judge is going to do about this. And again, I go back to what I told you. If you were the Judge and you had somebody come in and say, I made a mistake, I'm sorry. Or you had someone come in and say, I don't know about that. All the evidence shows that, in fact, that's how it got there. What are you going to do if you are the Judge? What are you going to do? If you were the Judge, what would you do? Would you give a break to somebody who came in and lied in your face?"

Q Okay, were you talking about all the evidence shows that, in fact, that is how it got there? Did you explain to him anymore of what the evidence was that you had besides the inconsistencies in his statement?

A It's not in the transcript, sir.

Q Do you recall other things that you may have told him throughout this about what all the evidence was that was against him?

A The inconsistencies in his statement. The very, in my view, limited likelihood he would just happen to be at the right garage sale at the right time to buy the computer that was stolen from a place where he was working. All of those things led me to believe that he was involved in it.

Q Okay, approximately just a page or two, I want to ask you about some other things that were said. Mr. LaFrankie is talking-- you are saying about, "Why don't we go up to your house," this is at the bottom of page 10 and he says, 'If it's a good chance"-- don't understand-- "and if it is where do we go from there." Do you remember him asking you that?

A "Why don't we run up to your house." He says, "If it's a good chance"-- not understandable-- and if it is where do we go from there?" I said, "Well, we'll have to see."

Q There is a couple of other things that you and Detective Goecke said and then you make a comment, "That's why a polygraph works." Is that right?

A Pat told him, "There's certain things a person does without"-- and what she was referring to was autonomic nervous responses, "and there's certain things that your body does"-- she was referring to the fact you can't control things like your heart and blood pressure and I said, "That's why a polygraph works."

Q And then, "that is why a polygraph works." Then she says things about the panty boy stuff, about him being a panty boy or whatever, that is how bad you are at lying and is this the point where you say something about not taking him to jail? Can you tell the Court what it is you say next about specifically what you say about not taking him to jail?

A "I'm above your questions, to answer your question, unless you tell me you murdered Mother Theresa, you're not going to jail anyway, is that's what you're worried about, okay."

Q And then-- soon after he makes a comment, you did say something, "We don't put people in jail unless we have to." Right?

A That is correct.

Q And then later on in that same exchange you said, "Now, I can't tell you what they're going to do to the guy that stole this, okay, except to say, and you remember that Boulder County is the place they sent somebody to college for murdering somebody, okay. Okay." Is that what you said?

A Yes, it is.

Q And what is behind this here when you are down at the end of the sentence and you are saying, "sent somebody to college for murdering somebody, okay, okay?" What is behind this. Is there some nodding going on where you are trying to make some kind of connection like that you understand what I am telling you about?

A I don't recall nodding. I am not saying it didn't happen, I don't recall.

Q Are you trying to communicate to him or anything like that?

A I guess so to him.

Q Are you trying to communicate to him that this is something that you are not going to be treated very harshly; is that what you are trying to communicate?

A What I was trying to communicate is that he may have made a mistake, but it's not the end of the world, mistakes happen.

Q So, what you are trying to communicate in this exchange is that he is not going to be sentenced harshly?

A Yes, in my estimation.

Q And this is still back at a point before he confessed. This is the time where you are still questioning him about that; is that correct?

A Yes.

Q And then a little later on there is an exchange that

is unusual on page 13 or 14 where there is kind of a theological Christian discussion by you and Detective Goecke, do you recall that?

A Mr. Lafferdie brought it up first about the church that he belongs to.

Q Right, he said the last time he got in trouble they removed him from the church and even people from the church couldn't talk to him, even his own family?

A I forgot the term he actually used but it was sort of like shunning and the last time he got in trouble which was for the check case I already told you for the other time, nobody talked to him for a year.

Q And then he told you that he thinks that if they see that again-- he gets in trouble again, he will be released from the church, is that right?

A My understanding was by him saying the same thing would happen all over again.

Q And then I told him-- essentially you tell him-- you start talking to him about how God will know if he is lying and then he will have to face him a lot more seriously than he has to face you; is that right?

A That is correct.

Q And then this goes on-- there is more of this too, I mean you and Detective Goecke are doing some more talking about this, about the things that Christ had to face and he knew

before he was born he was going to have to be sacrificed and all this stuff goes on for a little while; is that correct?

A That is correct.

Q And then you make a statement on page 15 at the top where you say, "I understand how nervous you are. I'm doing everything I can to reassure you that this is not the end of the world." Is that right?

A That is correct.

Q And this is still before he admitted he took the computer?

A That is correct.

Q And just before that, you actually asked him to return the courtesy because the last time you had a case with him, you thought you treated him pretty well and you say, "I wish you'd give me some courtesy back," do you recall that, the bottom of page 14?

A I don't think at that time I knew he had been arrested by myself earlier.

Q The last couple of questions I have had to do this thing that also goes on on page 15 where you are talking about another person who is a known liar, that the police department and most police officers know he is a liar; do you recall that?

A Yes.

Q And do you recall at the end of that saying, "They

all knew he lied and they all laughed when he went to jail again. You know what? He went to jail. He's still there, okay." Do you remember that?

A That is correct.

Q And Detective Goecke says, "And that was before Court" and you say, "Yeah". Correct?

A Yes.

Q And then you say something about how you are going to make reference to the district attorney about whether you felt he had the Smith -- lied to you, something to that effect, that that would be the same regard to the district attorney; is that right?

A That is correct.

Q You give back that job thing here -- his job was through working as a temporary service; is that right?

A I believe he was working for a temporary service.

Q You know he made like $5.25 an hour?

A He said he was getting $300.00 a week with overtime and I don't know how much that works out to an hour.

Q And so then it's not until after that last comment we had, it was not until about page 16-- well, we went over this already. I ask our exhibit be admitted into evidence.

THE COURT: Any objection to exhibit 1?

MR. LOUTH: No objection.

THE COURT: It's admitted.

MR. LUCAS: I also ask that we do, Judge, a motion and order to get a free copy of the tape recording and I don't know that the Court ever ruled on that.

THE COURT: You did not get it?

MR. LUCAS: I didn't get it and I didn't get it back. We waited and I was gone a portion of last week and my investigator told me we hadn't gotten the motion.

THE COURT: You do that?

MR. [illegible]

THE COURT: [illegible] need to make a copy and do that.

MR. LUCAS: I ask that tape be entered into evidence at this time and we will make a copy from it.

THE COURT: You can review it, okay? What else? Redirect?

BY MR. [illegible]: REDIRECT EXAMINATION.

Q You. Well -- Trooper, in regard to the issue of the polygraph which comes up for the first time, I believe, on page-- well, explain to the Court how the issue of the polygraph came up?

A Well, initially I asked him how he would do if he took one.

Q And how did he respond-- or let me ask you this, why did you go on with that subject of the polygraph?

A I just did, I don't recall specifically.

Q Well, was it in relation to any type of subject like

credibility or you saw signs?

A Well, all during the interview, I was seeing signs from him based on the training and experience I had with the police department.

Q And--

A He wouldn't look us straight in the eye, he kept fidgiting around, holding his arms up over his chest, trying to hold things in and that says two things, A, he is trying to hold something in but at the same time I still really felt he wanted to talk to us and I found that was really verified at the conclusion of the interview because he felt much better after he told us he took the computer, much better.

Q He felt much better after he told you he took the computer?

A Much calmer.

Q And I am not sure if I understood, you said that he acted nervous but yet it seemed to convey that he wanted to keep talking to you?

A Yes.

Q What do you mean by that, can you articulate why you felt that way?

A Well, he was sort-- he would sort of ask around things. He was concerned about what might happen if this, in fact, happened. He just-- he would make statements and would almost leave it hanging in the air, like he wanted to say

something else but was kind of afraid to do so.

Q Now, do you have the tape with you and do you have the means of playing a portion of the tape?

A The tape is on the desk and the recorder is right here.

Q Do you know where you put it on the desk?

A To the [illegible], in the folder.

Q Well, I don't want to be part of the chain of custody and perhaps we don't need to play it since it's been admitted into evidence. My question is this. I see throughout this transcript, you've already made [illegible] to the effect of, "We understand that people [illegible] mistakes" and Mr. Lucas asked you if at times during the conversation, wasn't the conversation confrontational in nature?

A No, it wasn't.

Q It isn't?

A No.

Q How would you describe the tone of the whole interview?

A It was a quiet discussion. I was trying to provide him the opportunity to tell me what he really wanted to tell me anyhow.

Q And why did you keep saying, "I know that people have made mistakes?"

A That is one of the things I am trained to do when I

am taking an interview which is in some way to minimize the error.

Q Is that designed to give them the feeling of sympathy from you?

A Yes, I believe so.

Q To make them more relaxed so they can make a confession?

A Yes.

MR. LOUTH: No further questions.

THE COURT: Recross, no?

BY MR. LUCAS: RECROSS-EXAMINATION,

Q Well, I do, yes, Judge. Wait a minute, though, I mean Mr. Gafranke and you-- I mean you guys seem to be getting along so well but he's be always saying things like, "I can tell what you are going to say, you think I am a liar, you already made up your mind." Weren't there parts of the conversation like that?

A He did make those remarks, yes.

MR. LUCAS: I don't have any further questions.

THE COURT: You can step down. Do you have other witnesses on this issue?

MR. LOUTH: None, Your Honor.

THE COURT: Any evidence?

MR. LUCAS: No, Your Honor.

THE COURT: Argument?

MR. LOUTH: Judge--

MR. LUCAS: Could I have a moment?

THE COURT: Yes.

MR. LUCAS: I call Mr. LaFrankie.

THE COURT: It will be a few minutes?

MR. LUCAS: It won't be long.

Having been called as a witness and after being duly sworn, the witness testified as follows:

THE COURT: Please be seated, state your name and spell your last name.

A [illegible]

BY MR. LUCAS: DIRECT EXAMINATION,

Q Mr. LaFrankie, how did you feel in regards to whether you felt you would leave that interview with the detectives?

A I didn't feel I could.

Q And why is that?

A I don't know, I guess when you have two police officers around you, you just feel intimidated.

Q How long did the interview go on; do you recall?

A Thirty to 40 minutes.

Q And did you-- how was the tone-- how did you feel about the tone of the interview with the two officers coming and asking you questions?

A Very accusing and very like they already made

up their minds that I did it.

Q Did they ever seem to respond to your answers that made you feel like they believed anything you were saying?

A No.

Q So, you thought this was like 30 to 40 minutes of just constantly them telling you they thought you were lying?

A Yeah.

MR. LUCAS: No further questions.

THE COURT: Cross-examination?

BY MR. LOVIN: CROSS-EXAMINATION,

Q Mr. Lavender, that is your job there at the plant?

A I took the parts and processed them to be put on the circuit boards.

Q What type of computer was stolen?

A That I recall a computer.

Q Okay and you took that home and set the computer up at your house?

A There was a computer that was set up at my house, yes.

Q Okay, well, you made a confession you took the computer from work?

A I did.

MR. LUCAS: I object as being outside the

scope of direct.

THE COURT: Sustained.

Q The computer-- the computer that Detective Scott took from your home is a highly technical computer; isn't it?

MR. LAING: Judge, I am going to object.

THE COURT: Sustained.

MR. LAING: If I could respond on the record. What I am trying to establish is that this is someone who is capable of very subtle logical thinking. He is very knowledgeable when it comes to technical things and that we are not dealing with someone here who is of an educational background of elementary school. We are dealing with someone here who is very capable.

THE COURT: You can ask questions that go to that issue but I have told you not the questions you are asking go to that question.

Q You work with computers for a living; don't you?

A I work on components of computers for a living.

Q And you know how to run computers?

A I have a very basic knowledge of running a computer, yes.

Q And you know how to upgrade computers?

A No, I do not know how to upgrade computers.

Q You know how to upgrade software for computers?

A No, I don't.

Q You have had quite a bit of experience with law enforcement; haven't you?

A Not really, no.

Q Okay, you have been on a deferred sentence for a felony charge?

A Correct.

Q When you pled guilty to that felony charge, it was in court?

A Yes.

Q And were you given a very lengthy advisement of rights in court as to what your constitutional rights are in a criminal case?

A I imagine so.

Q And you also-- were you found guilty of perjury or did you plead guilty to perjury in Adams County?

A The perjury charge was a plea bargain with the district attorney on the same check fraud case.

Q Okay, when you pled guilty to the perjury in Adams County, did you receive a very lengthy advisement of rights as to what your rights are in a criminal case?

A I would imagine they would give me that, yes.

Q And would you be surprised-- well, in regard to the interview that took place between you and Detective Scott and Detective Goecke, the tone of that conversation

was very-- was very light and quiet; wasn't it?

A Not really, no.

Q Would you be surprised to hear that the typist who made the transcript had trouble hearing all the words because it was so quiet in the room?

MR. LUCAS: I will object on relevance. I think also--

THE COURT: Sustained.

Q In regard to the conversation that you had with the policemen in the room after they asked you if you had a couple of minutes to talk to them about this crime, your main concern was that you might lose your job over this; wasn't it?

A That was a concern, yeah.

Q And that is why you sat down and talked with them; wasn't it?

A No, I sat down and talked with them because management was wanting me to and I didn't feel that I could just say, "no" and leave.

Q And at some point you even said to them, "yeah, I want to clar this thing up myself?"

A I believe I made that statement.

MR. LOUTH: No further questions, Your Honor.

THE COURT: Redirect?

BY MR. LUCAS: REDIRECT EXAMINATION,

Q That statement was right at the beginning of the conversation with them; is that correct?

A I believe so, yes.

MR. LUCAS: No further questions.

THE COURT: You can step down. Any other evidence?

MR. LUCAS: No, Your Honor.

THE COURT: Argument?

MR. LOWEN: Your Honor, although I didn't read--I couldn't find the motion to suppress in the file, I take it the issue is one of custody and Miranda Warnings and secondly, whether-or-not the confession that was obtained from the detention was voluntary. First of all, in regard to the issue of custody, as the Court knows fully well, the Court has to use a reasonable person standard of review in determining whether-or-not a reasonable person would have felt that their liberty was restricted to such a degree equated with the formal arrest and in applying that test, the Court can look at the educational background of the defendant. You can look at the defendant's experience with the system. The Court can also look at the place of the interview, the length of the interview, whether-or-not any physical force was used and those are all issues that are looked into in determining whether-or-not one is in custody. I would argue that the defendant was not in

custody in this situation because of the fact that the interview took place at work. It was only a half hour in length. The interview took place at a location where the defendant was very familiar. The mood of the defendant would be one of-- well, it would be completely different at work as opposed to going down to the police station. This interview took place at his place of work, obviously. In regard to the [illegible] talk with them, he stated on the stand that he talked with them. One of the main reasons that it [illegible] was that he was scared of losing his job. I would argue that that is not a factor in determining whether one is in custody and I would cite as authority for that proposition People vs. Tomanio wherein a police officer who was a subject of a sexual assault investigation was hooked up to a polygraph and after the polygraph was done, the person conducting the polygraph said, "I believe you are deceptive with me, would you like to talk with me" and the police officer stated that the-- the investigator also said that, "if you refuse to talk to me, I will tell your supervisor about it." The police office testified at the motion's hearing that he felt that if he didn't cooperate and talk with the person running the polygraph that he would lose his job. The Supreme Court, reviewing that case, said that fear of losing one's job is not a factor for custody. The

focus is on the police, it is not on the job. If the defendant (sic) also imposed a fear on him that if he would not talk with the police, he would lose his job, that is unrelated to having fear placed on one from police that if you don't talk to us, you are going to jail or you have no choice but to talk to us. I would ask the Court to review the transcript and also from that transcript that Detective Scott is telling the truth when he says that at the outset of the interview, he simply said to the defendant, "We are here to investigate the theft of the computer, do you have a few minutes to talk with us?" and the defendant said, "yes, I would like to clear this matter up." If you look through the transcript, you can see, even if you don't listen to the tape, that the general tone that was used during the interview was one of somewhat of a, yes, it is a soft technique used to make one comfortable and relaxed so that confession is more likely. The Supreme Court in People vs. Jennings had the same situation or similar situation in that the person running the polygraph said that-- the defendant, who was a policeman, after the polygraph is over, she said, "I think you are being deceptive and I think you will feel a lot better if you tell me the truth" and the person who was running the polygraph was alone with that policeman for four hours. At the end of the four hours, the policeman eventually broke down and said that, yes, he had been-- the

defendant broke down and said, yes, he had been lying and he committed the crime pending against him. The Supreme Court at one point, interestingly enough, stated that, "although the polygraph examiner's manner and style of engaging the defendant in a post-interview situation were psychologically coercive, we cannot say with any assurance the polygraph examiner's conduct played any significant a role in overriding the defendant's will so as to have caused the defendant's confession to be involuntary or [illegible]." I would submit to the Court that's the case here. We don't have a situation where the police officer is lying about what evidence exists, the officer isn't saying, "look, so and so told us that you did it," we have a situation where the officer never alluded to the statement that, "listen, we all made mistakes, but if you just let's get better if you just lay this out," and I don't think that type of scenario plays such a significant role as to override somebody's free will under the circumstances here.

Any further argument, Mr. [illegible]?

MR. SMITH: No.

THE COURT: Mr. Lucas?

MR. LUCAS: I guess one of the big problems here is we have been talking about that there was an advisement of Miranda Rights in the Jennings case so that is very different than the case we got here. Judge, we got

a situation where you just don't get to do this, you don't get to take somebody off their working floor, take them into the victim's office where you know your job is on the line. This is the victim of the crime here. It's very much different than Jennings and talks to him for half an hour with continued prodding and telling him that he looks like he is sweating like a stuffed pig and got lint all over his face and he is lying, lying, lying and then just get to come back and say, "Well, I guess it just wasn't custody" and the Court, all it can do, is take a look at some of the things that was said here and you can see it creates an incredibly custodial type of circumstance. They talk about what a Judge would do, what I would do if I were the Judge. They are talking about how Boulder County will go light on him if you all do these kinds of subtle ways.

THE COURT: How does the conversation create custody? How does the tone of the conversation create custody? Doesn't the tone of the conversation go to voluntariness?

MR. LUCAS: Yes and I am probably confusing those two issues at this point in time but what you got with the circumstances is similar to a case we had this summer in this Court where the initial situation may be somewhat voluntary but the actions of the police

and the time factor here of half an hour or so of conversation creates more of a circumstance of custody. He is never told he is free to leave. He is never told he is not in custody. He is never given any Miranda Advisements whatsoever and they get him-- they removed him from a location on the floor and he is told by his boss-- his boss wants him to go to the police. The boss is the victim, acting on the part of the police as well and saying, " we're going to take a break" -- get him off the floor, gets him to a place where they can talk to him and once he is there, there is this authoritative accusatorial tone and he is never told he is free to leave. He is not sitting in a familiar environment as in the case of the boss's office. It's similar, there, I think to the situation where sometimes the circumstances can create a custodial situation. In other words, a person may not voluntarily go down to the police station but their words & actions by the police and certain things that is said by the police create a custodial situation. I will cite to the Court five cases. That would include People vs. Bern, this is a 1990 Colorado Supreme Court case found at 790 P. 2d 816. The Supreme Court found, The defendant was in custody at the time he gave statements to the police, so that Miranda applied, and was supported by evidence that defendant came to the police station at request of police, that he was

accused of sexual assaults, that he denied them, that he was was accused of lying, thta he was urged to take a polygraph examination, that he was encouraged to confess for the therapeutic effect it would have on the victim, and that, although he was told that he was free to leave and would not be arrested that day, he was informed the charges would be filed against him regardless of what he said during the interview," and that is exactly the type of situation we have got here because we are getting all of these subtle promises during the conversation, things about him not being arrested and yet the charges will be filed anyway. We got them talking about, you know, "if I were you, we got all this evidence, all this evidence about we'll find out anyhow, we'll get to the truth anyhow," telling him that. This situation is very similar to the facts in Horn. The therapeutic effect it would have on the victim is not the case here but therapeutic effect it would have on Mr. LaFrankie and also talking about his, you know-- playing on his religion, bringing that into the interview as well. Although he was told he was free to leave, that is what the evidence in Horn is, he is never told he is free to leave. Here, they say, "do you want to take a polygraph examination?" He is told point blank by the police officers there will be a polygraph examination.

When the polygraph comes out, this is what is going to happen, what the result is going to be when the polygraph examination comes out is it's going to show you are lying. This is very similar fact situation as People vs Horn.

THE COURT: Let me see it.

MR. [illegible]: I will give the Court all the cases I am citing. Another case would be Jones vs. People, this is a Supreme Court case of Colorado in 1986 found at [illegible]. "The defendant's statements to police were a product of custodial interrogation so as to require Miranda warnings where, by reason of suggestion made by police that defendant was lying after two hours and ten minutes of questioning at station house, any reasonable person in defendant's position would have considered himself [illegible] deprived of his liberty." The situation where they are continually berating him and telling him he is lying, that no person would think they were free to leave. People vs. Trujillo found at 784 P. 2d 738, a Colorado Supreme Court case from 1990, says, "Officer's station house interview of defendant was custodial interrogation requiring advisement and waiver of Miranda Rights; though officer was polite and placed no physical restrictions on defendant, the questioning, conducted in station house interview room with only

officer and defendant present, lasted approximately one and a half hours, purpose of interrogation was to gather evidence against defendant and refer matter to district attorney, questions put to defendant were accusatory in nature, and defendant was not certain that he was free to leave." So, I think it's stronger than the case here-- than in the cas[illegible]. As well, there is 782 P. 2d. 791, People vs. Cleburn and that is a Supreme Court case from 1989. "The evidence supported the trial Court's finding that interrogation which took place in defendant's home was custodial, requiring Miranda Warnings, including fact that the deputy initiated conversation, and that purpose was to obtain evidence against defendant; moreover, the interrogation lasted 20 to 30 minutes and finally, on a related matter I would cite to the Court, People vs Harris case, 703 P. 2d 667, a Colorado Court of Appeals case, 1985, "Failure to administer Miranda Warnings creates a presumption of compulsion and, consequently, unwarned statements that are otherwise voluntary within meaning of Fifth Amendment must nevertheless be excluded from evidence." That is-- in some cases, Judge, we are talking about crossing over the line, whether we are talking about custody or involuntariness but the actions of the police officers in this case rises to

the level of the type of outrageous behavior that could have been easily cured by the giving of a warning. It could be easily cured by telling him he had a right not to speak to them, tell him he didn't have to answer those questions and instead, not one but two police officers double-teaming him, continually telling him he is lying. We got a transcript for the Court. The Court can listen to the tape if the Court wants to do that but I think we brought out most of the salient facts that were at play here. I don't think that making these continued references to what a Judge would do and, "This is Boulder County and we would like to give this guy a break if you talk to me and stuff like-- so, you not wanting to worry about because you are not on probation anymore, this isn't the crime of the century," and he kept trying to tell him this isn't the crime of the century, it isn't going to be that bad, it's not that serious, that kind of stuff is very coercive. Some of the other things that were brought out, I believe, are the stuff about the polygraph which I had gone over before, coercing him that there is going to be-- on page eight, "When we put you on a polygraph, you are going to fail." That kind of stuff. It's just not right. It's highly coercive. Telling him about the guy who lies is in jail and still in jail before even coming to Court, that is what the officers told him. I mean that is pretty obvious when you got the

guy saying-- the one detective saying, "unless you tell me you murdered Mother Theresa, you are not going to jail," basically promising that if he cooperates, he is not going to jail and the other person, the other detective telling him about the person who lied to them, now that person is in jail even before going to Court. It's kind of subtle things that are at play all over-- some of them not very subtle things all over this interview.

THE COURT: Anything else, Mr. South?

MR. SOUTH: I would note for the Court that People vs. Jones is a station house interview. People vs. Trujillo is a station house interview. People vs.--

THE COURT: People vs. Cleburn is not, Cleburn is in the home.

MR. SOUTH: You are not--

THE COURT: Mr. Cleburn took place in the home.

MR. SOUTH: Yes, it was a sparsely populated area where the police drove out, went to his house and, in fact, had fairly good evidence he was a suspect in committing a menacing. In People vs. Horn, which the defense relies on very heavily, The Court notes that the interview took place in a room that was eight foot by 12 foot. There were no windows. Again, that was at a police station, obviously. The officers left him alone by himself in that room, the eight foot by 12 foot for a period of time so that

he could think it over. I would argue that all of those cases can be differentiated from the case at hand, primarily because the officers in this case, you can tell from the transcript, did not know if he had actually stolen the computer. At first, it was from the angle of he just was in possession of stolen property and that a theft by receiving complaint was possible, they were on a fact finding mission and I would argue that the defendant was not in custody in light of the facts that-- in light-- well, the things have already been gone over, I won't take up the Court's time to reiterate them anymore.

(The ruling on this issue has previously been transcribed and is hereby deleted, as requested.)

THE COURT: There was a search which was pursuant to it, neither of you addressed that in your argument pursuant to the interview. There was a search made in which a consent was signed. We didn't discuss that in any specific detail. So, you need to explain to me how you feel you are going to approach the consent? If there was a sufficient basis for the signing of the consent to search, the search would be valid. If it was not, it would not be. Is it? It depends upon what you are going to argue and show.

MR. LUCAS: Well, Judge, we'll argue about based upon what we heard is that Mr. LaFrankie was not willing to consent to a search and that later on in this

same-- in this same defective interview--

THE COURT: Well, the very first page, like two seconds into it he says they can go look if they want to.

MR. LUCAS: I think again the Court will be in a position where there will be the same ruling about Miranda, the same kind of decision, questioning this person whether-- in determining whether this is knowing or voluntary.

THE COURT: I don't have the consent form and nobody talked about it. I don't know if someone anticipated we would do that another time or what. There is a written consent I heard about but I didn't hear any evidence about it. Are the people putting any evidence on about it? I don't know if you are or not but do you have a different impression how you were going to proceed?

MR. LOUTH: I would like an opportunity to go ahead and put on evidence with regard to that issue and although we don't have the form, Detective Scott can still testify as to what occurred.

THE COURT: Mr. Lucas?

MR. LUCAS: I think the Court's situation is that what the Court heard is that Mr. LaFrankie wasn't given an adequate advisement of his rights regarding anything and the question is he is never given even the option of, you know--

THE COURT: I don't know what the consent is. That

I am saying is if there is more evidence about that-- I don't know, if it wasn't put on because you were all going to anticipate doing it after the Court's ruling here, that is fine. I don't know what you anticipated.

MR. LUCAS: I had not anticipated that.

THE COURT: Do you have evidence about the circumstances under which the consent to search was signed and what advisements were given, all the rest?

MR. LOUTH: Other than the transcript?

THE COURT: Yeah. If the transcript is it, I am prepared to rule on that--

MR. LOUTH: Judge, I would like to call Detective Scott to the stand.

THE COURT: Detective Scott, you are still under oath.

DETECTIVE SCOTT: Yes.

BY MR. LOUTH: DIRECT EXAMINATION,

Q Detective Scott, we have all reviewed the transcript and the transcript of the interview that you had with the defendant in this case. Now, early on in the interview, the defendant indicated that you could look at his house if you wanted to. Did you actually go over to his house at some point then?

A Yes.

Q Okay and approximately what time of day did

the interview take place?

A It took place about 3:00, 3:00 to 4:00.

Q Okay and what time of day did you go over to the defendant's house?

A Right after we did the interview.

Q Okay and at that time was there any further discussion about going into his house?

A When we were in the house, I believe he signed a consent to search form printed by the Longmont Police Department which discusses the fact that he has the right to consult an attorney before agreeing to a search and the right to refuse to have such a search made without a search warrant and none-the-less he agreed to allow us to have the search of the residence.

Q Okay did he actually sign that form?

A I believe so.

Q Did he indicate he had any trouble reading the form at all?

A No.

Q What was his mood like at that point?

A He felt better.

Q From the confession?

A I think so.

Q Now, you didn't go over to his house with him; correct?

A .No, he drove his car and we drove ours.

Q Where did he meet you, at the front door, in the house?

A I think he got there shortly before us and he was at the front door or we followed him up to the front door.

Q Okay, so he let you into his house?

A Yes.

Q Prior to his signing the consent form, had you asked to see the computer?

A Well, we could see it in the kitchen. It was there, the kitchen was visible from the living room.

Q It was visible in the kitchen but did you know that was actually the computer?

A I am not sure in which order they came in.

Q Well, I guess it doesn't make much sense to do a consent to search if the computer is right there?

A I believe we had him sign the consent to search first but I am not sure.

Q Did he have any questions?

A The only issue that he raised was that he had upgraded the computer and he was concerned about the money he had spent upgrading the computer. He put something into it, I don't know that much about computers myself and he was concerned about what he had put in there. He was concerned

about a part because he took it out and put in another one.

THE COURT: Cross-examination?

BY MR. LUCAS: CROSS-EXAMINATION.

Q Detective, Mr. LaFrankie recalls that you went inside the home and were in the home looking around and then you came out and handed him the consent to search. Do you recall that?

A I'm sure we were in the house before he signed it, yes.

Q Before he signed it, okay and you saw the computer right by the door when you came in?

A It was in the kitchen but you could see it from the living room.

Q Okay and do you recall exactly where it was that the signing of the consent form or going into the consent form was?

A The living room, right off the kitchen.

Q Okay and you are not sure exactly when that occurred?

A Not exactly.

Q Okay, did you read through the form with him?

A Yes.

Q Did you read it out loud to him?

A I usually do, I don't specifically recall now but

I usually do.

Q May you have not in this case?

A I doubt it.

MR. LUCAS: No further questions.

THE COURT: Anything else?

MR. LOUTY: No, nothing, Your Honor.

THE COURT: You can step down. Other evidence?

MR. LUCAS: We will call Mr. LaFrankie.

THE COURT: You are still under oath.

MR. LAFRANKIE: Yes.

BY MR. LUCAS: DIRECT EXAMINATION.

Q What is your recollection of what occurred at your residence?

A They came to the door and we went in. The computer was in the living room on the dining room table and he got some paperwork out and said, "I need you to sign this consent to search" and I signed it on my desk which was also there in the dining room but I believe undoubtedly I would-- I read through it and signed it and gave it to him and then they started taking serial numbers

THE COURT: I don't understand what you said, undoubtedly you would or you did or what?

A I don't remember that I definitely read through it but I know I signed it but the officer never read it over with me. It was just handed to me and I do have a habit

of sometimes of not always reading things, just taking somebodys word for what it says and signing it.

THE COURT: And this was after the officers came in and discovered the computer there?

A Yes.

THE COURT: How did they get into the house, did you open the door and let them in?

A I don't recall exactly, they either followed me in or were very close behind me.

THE COURT: They didn't go in without you, did they?

A They didn't go in without me.

Q And you had the keys, right?

A The door was unlocked, my wife was at home.

MR. DUCAS: No further questions.

THE COURT: Cross-examination?

BY MR. LOUTH: CROSS-EXAMINATION,

Q They didn't go into the house against your will?

A Probably not but I didn't feel I could tell them, "you can't come in."

Q And you did invite them over to the house to look at it?

A I invited them over to the house to search the house.

MR. LOUTH: No further questions.

THE COURT: Anything else?

BY MR. LUCAS: REDIRECT EXAMINATION,

Q Why did you do that, why did you ask them over to the house?

A Because they told me they could get a search warrant so it seemed like it didn't matter one way or the other.

BY MR. LOWE: RECROSS-EXAMINATION,

Q Then did they tell you that?

A [illegible] believe, in the interrogation in my [illegible] office.

Q You believe they did that?

A I know I was told they could get a search warrant, it just [illegible] it was at the house or if it was in the [illegible] where I was employed.

Q Okay, so it was either at the house or in the interview room?

A Correct.

MR. LOWE: No further questions.

THE COURT: Okay, you can step down. Argument?

MR. LOWE: Judge, I would argue he did give them voluntary consent in that he said at the very outset of the interview that the police could come over and look at this computer. His comment just now that the police said, "if you don't let us come over, we could just get a search warrant," I would just ask the Court to find that to be not credible in light of the fact that at the outset

of the interview he indicated they could come over and look at the ocmputer. Also, Detective Scott indicated that the defendant, after confessing, felt much better, to basically have it off of his-- not to use the words but to basically have this matter off his chest. The consent was made at the outset of the interview. As far as whether the consent form that he signed took place after Detective Scott had seen the interview-- or had seen the computer or took place before or afterwards, I would argue doesn't really matter in light of the fact that they were already invited into the house and even if Detective Scott already saw the computer before the consent to search was signed, the computer was in plain view at that point. This is not a case of fruit of the poisonous tree because of the fact that the Court found that the defendant was subjected to custodial interrogation after taking into consideration the nature of the interview as seen throughout the transcript. This consent of, "you can come over to my house" took place at the very start of the interview which I would argue took place before the defendant was being subjected to custodial interrogation. His invitation over to his house then allowed the police to go over there. They are going into the house, seeing the computer and then would just be a matter of finding incriminating evidence in plain view, plus that before the police took anything, they

had a consent to serach which the defendant acknowledged he read and signed.

THE COURT: Mr. Lucas?

MR. LUCAS: The reason it is the fruit of the poisonous tree is because this is what the conversation was about. The Court already made a ruling about voluntariness, said that is not an issue here, they have got him down and they are doing this interrogation and they are, right off the bat, telling him that, "We are lying and we know you are lying and that is what we are prepared to do-- trained to do and we know" and they are all mix right off the bat. I mean that is the first thing going on.

THE COURT: None of that conversation is about going to go to get the computer. All the things I talked about? All during the course of that conversation, there is none of that said that "We'll go get the computer and you can't stop us." There is none of that? There is nothing in the transcript about that at all, that is why it's a separate issue, it seems to me. I don't see anything in there about anybody talking about getting the evidence or we can get the evidence. So, it's not a product of this interrogation?

MR. LUCAS: I know that there is a reference to a warrant in the transcript that the Court has in evidence and I don't know-- I am not having an easy

time finding it but I think Officer Goecke or Gokke's statement and argument to the Court that this is where it comes off from, they placed him in the position immediately where they believe that he has-- that he has to talk right off the bat. They don't tell him, "you can leave or you don't have to talk to us." It's the ruling the Court just made and all of that comes right off the bat.

THE COURT: There is a discussion about a warrant which is the warrant for arrest. However, there is a statement about do they have a warrant for his arrest.

MR. GOCKE: Or your arrest.

THE COURT: Yes, that is the one I recall.

MR. GOCKE: Right but the situation that the Court can see in the beginning here is the initial stuff about pinning him down and making him have to talk. The only reason they get to search in because they are asking him all of these questions and they ask him the questions about whether they can go over to his house to get the computer or not. So, it's not-- I mean if the Court is only focusing on that aspect of it, it's the fruit of a statement. The statement, he answers two questions about going over to his house. It's part of the same interrogation that they start out-- isolating him and grilling him with the questions and saying, "this is what we want to do and you

are lying to us and nobody would get nervous unless they had done something wrong and that is exactly what you are doing" and they they ask him the question if they can go over to his house and look through his house. That statement, that is the problem. In other words, it's the same ruling the Court just made, separating the issue of voluntariness from issues regarding Miranda. It's a statement because he is being coerced into talking to the police officers, not coerced, so to speak, but he is not being told he doesn't have to talk or he doesn't have to cooperate and so they continue to ask him these questions and the fruit is directly these statements, asking him questions about whether they can go over to his house during that same interview. So, there is no real break in the chain here. There would be a break if we were at that questioning maybe happened before the interview but it happens as a product of the interview and during the interview.

MR. COUNT: Okay except there is time that goes by between that time and the other time. There is time that goes by between the end of the interview because people have to drive there separately. They are no longer in the proximity of the officers. He is then given a written form that talks about his rights in more detail. You don't think anything is anticipated by all those things that happened?

MR. LUCAS: No, because the conversation occurs and from the testimony the Court heard, there was not a great gap. They sit around and pat each other on the back. They get done with the interview and right away asking about going to his house occurs there and they separate, he is not with the police any longer. There is no more contact where they are given the opportunity to, say, remove the tape by saying, "here, let's talk to Mr. Lavrankie and tell him we don't have to go to the house." They drive separately and the whole time he has in mind that he has to let them in his house. Based on conversations, they go to his house, they go into the house and then when the officers are already in the house and they already found the computer setting right there, then they hand him a consent to search. "Oh, you, we forgot to do the consent to search. [illegible] whether it's voluntary or not. This is why I don't think there is any taint removed.

THE COURT: I will give you an opportunity to brief the issue of whether-or-not the taint is removed or not at that point so that I can rule appropriately. We got the evidence that we need. There is a motion to continue, do we have to deal with that motion?

MR. LUCAS: I think so, Judge, I will be in trial next week. I got two jury trials next week and this is the week after so what I am saying to the Court is I don't

think I can brief the issue and be ready to resolve anything in the next--

THE COURT: You are not objecting to their motion to continue?

MR. LUCAS: If I could have a minute?

THE COURT: Let's go off the record. (There was a short discussion between counsel) We are back on the record, Mr. Lucas?

MR. LUCAS: Yes--

THE COURT: What do you have to say about the motion to continue the trial?

MR. LUCAS: We don't object to the Court continuing the trial.

THE COURT: Whatever we set do you agree would be within thirty days ready trial dates are necessary?

MR. LUCAS: That is correct.

THE COURT: Is that correct, Mr. LaFrankie?

MR. LAFRANKIE: Yes.

THE COURT: Okay, the week of January 25.

MR. LOETH: Fine.

MR. LUCAS: That is fine.

THE COURT: Could we have briefs within 15 days on the issue about the search?

MR. LUCAS: Could I ask the Court for 20? The rest of this week I will be preparing for trials. All next

week I will be in trial, there are two trials.

THE COURT: That is why I gave you 15, all right, 20. Short briefs.

MR. LUCAS: Thank you, Judge.

MR. LOUTH: Thank you.

No. 93-1039

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

THE STATE OF COLORADO,
Petitioner,
vs.
LESLIE BENJAMIN LaFRANKIE,
Respondent.

REPLY BRIEF

On Petition for Writ of Certiorari
to the Colorado Supreme Court
Case No. 92SA476

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Respondent.

REPLY BRIEF

On Petition for Writ of Certiorari
to the Colorado Supreme Court
Case No. 92SA476

THE ISSUE PRESENTED IN THE PETITION WAS FULLY PRESSED AND PASSED BELOW.

Respondent asserts that "Petitioner's argument concerning the correct definition of custody for *Miranda* was not pressed or passed below." (Brief in Opp. at i; 4-7; and 54). This assertion is simply wrong.

Petitioner presented arguments to the Colorado Supreme Court in its Opening Brief, Reply Brief, and Supplemental Authorities.[1] The main issue presented was that the trial court failed to determine custody through consideration of whether the police had

[1] Because the record has not yet been forwarded to the United States Supreme Court, copies of these court documents have been lodged with the Clerk.

imposed restraints "of the degree associated with formal arrest" under the analysis established by this Court in *Beheler v. California*, 463 U.S. 1121 (1983), *Minnesota v. Murphy*, 465 U.S. 420 (1984), and *Berkemer v. McCarty*, 468 U.S. 420 (1984).[2] This issue is identical to the issue presented in this Petition.

The Colorado Court found the interrogation to be custodial without reference to the analytical framework established by this Court, and argued by the Petitioner, for making that determination. This willingness of the Colorado Supreme Court to determine custody while disregarding this Court's decisions on how that determination is to be made demonstrates the great need for this petition to be granted so that this serious error of substantive omission can be corrected.

RESPONDENT SEEKS TO EXPAND *MIRANDA* THROUGH A DETERMINATION OF CUSTODY BASED UPON SUFFICIENT COERCION, BUT IT IS "CUSTODY" WHICH DEFINES THE SITUATIONS TO WHICH *MIRANDA* IS LIMITED.

Respondent argues that since concerns about coercion in the custodial setting underlie *Miranda*, the existence of custody itself can be determined from the degree of coercion which might arise from the interrogation.[3] (Brief in Opp. at 38-54). *Miranda* is premised,

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[2] See particularly pages 10-12 and 13-21 of the Opening Brief, pages 1 and 3-10 of the Reply Brief, and both pages of the Supplemental Authorities. For the Court's convenience, a few excerpts from the briefs submitted below are included in Appendix D to demonstrate the issue which was presented.

[3] In discussing the two components of custody and interrogation, Respondent argues that "... in a setting where one component is by itself insufficient to warrant *Miranda* warnings but the other is highly compelling, the higher component may compensate for the 'shortcomings' of the

however, on the coercion inherent in a custodial setting, not on coercion in general.

This Court has said, "*Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of ... in-custody interrogation.'" *Beckwith v. United States*, 425 U.S. 341, 346 (1976) (quoting *Miranda*). This Court has also emphasized that:

> *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which *Miranda* by its term was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. 492, 495 (1977). This Court has further explained that custody is "an interrogation environment ... created for no purpose other than to subjugate the individual to the will of the examiner" in which the suspect "is painfully aware that he literally cannot escape a persistent custodial interrogator." *Murphy*, 465 U.S. at 433.

The analysis applied by the Colorado Supreme Court, which the Respondent defends, does not limit *Miranda* in the way this Court

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component that features a lower degree of compulsion. [citation omitted] *Miranda*, then is required whenever both elements aggregately exert on a suspect a certain level of compulsion, even if one element standing along is below that threshold. [citation omitted]" (Brief in Opp. at 46-47). This approach provides no guidance at all to police, who would not know when they begin to question a suspect whether the facts will develop to the point where "both elements aggregately exert on a suspect a certain level of compulsion..." so that a *Miranda* advisement is required. This is a far cry from the bright line *Miranda* and its progeny provide in requiring the proper advisement only when interrogation takes place in custody.

has expressly stated that it is limited. Respondent, like the Colorado Supreme Court, would have the word "custody" be an expansive concept which extends to any coercive situation resulting from questioning. "Custody" is, instead, a particular setting in which a person is isolated through the actual assertion by police of domination and control, which literally precludes that person from escaping the questioning. That setting, not the myriad of situations which might seem coercive,[4] defines the limits of the application of *Miranda*.

COURTS ARE DETERMINING CUSTODY THROUGH DIFFERENT LEGAL PRINCIPLES WHICH HAVE SUBSTANTIALLY DIFFERENT MEANINGS.

Respondent argues that "the phraseology of the definition of custody, within certain bounds, is largely irrelevant" and that "it may well be more important to a correct resolution that courts apply the objective test than that they state the definition of custody in precisely the same way." (Brief in Opp. at 26). He asserts that the various formulations applied by different courts for the determination of custody are merely "parallel definitions of 'custody'" with no differences in meaning and no different effect in application[5] (Brief in Opp. at 25-26). His approach demonstrates the erroneous

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[4] Coercion in general should be analyzed as an issue of voluntariness under the due process clause. Although Respondent seeks to paint the facts of the interview in the most ominous light (Brief in Opp. at 1-3 and 49-51), the trial court found that the interview was handled in a low-key, truthful style, without promises or threats, and it was not handled in a manner calculated to overbear the Respondent's will, so that Respondent's responses were not involuntary (Pet. App. at B4-B5).

[5] Respondent acknowledges three "categories" of approaches to the meaning of "custody": "in custody or otherwise deprived of his freedom of action in any significant way;" "restraint on freedom of movement of the degree associated with formal arrest;" and "whether the individual being question would not be free to leave." (Brief in Opp., pp. 25-26).

tendency, followed in Colorado[6] and elsewhere, to view this constitutional issue predominantly as a matter of fact, to be determined unguided by a meaningful and consistent legal principle.[7]

Rather than being "parallel definitions" of custody, the various formulations concerning custody should work together, because each expounds on the meaning of custody. These phrases together build a full description of the important, but limited, situations in which *Miranda* comes into play.[8] The other descriptions of custody are subsumed in the most recent formulation, which focuses on restraints associated with arrest, which this Court has repeated in *Beheler*, *Murphy*, and *Berkemer*. This Court acknowledged as much by calling this focus the "the ultimate inquiry." *Beheler*, 463 U.S. at 1125. Courts are applying these other, partial descriptions in isolation from each other, as different statements of what should be a single controlling legal principle. Some, like the Colorado Court, ignore the "ultimate inquiry" entirely.

When applied alone, these other descriptions of custody lead to different basic assumptions about the purposes of *Miranda* and the nature of custody, to different frames of reference for the analysis

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[6] The Colorado Court said below, "The issue of custody is 'essentially a factual question that involves a trial court's assessment of the credibility of witnesses and the weighing of their testimony.' [citation omitted]" Pet. App. at C-6.

[7] This is not to say the facts are unimportant in the analysis, but only that an emphasis on facts provides no useful direction to the analysis and is no substitute for a controlling legal principle.

[8] These phrases refined "custody" so that it means situations where one has been deprived of his freedom of action in any significant way (*Miranda*) such that he is in "custody" (*Beckwith* and *Mathiason*) as a result of formal arrest or the imposition by police of restraints on freedom of movement of the degree associated with formal arrest (*Beheler*, *Murphy*, and *Berkemer*) so that he is literally not free to leave the questioning (*Murphy*).

itself, to different facts chosen for consideration and emphasis, and to different results. As the most obvious example, the outcome in *Berkemer v. McCarty* would have been different had the test for custody applied by this Court been whether one is "not free to leave" instead of whether one's "freedom of action is curtailed to a 'degree associated with formal arrest.'" Contrary to Respondent's assertion, the words used to express the guiding legal principle do matter. This case is an excellent vehicle for this Court to clarify the controlling legal principle.

RESPONDENT DEFENDS THE "OBJECTIVE" AND "TOTALITY OF THE CIRCUMSTANCES" APPROACHES TO THE FACTS, WHICH ARE NOT CHALLENGED IN THE PETITION.

Much of Respondent's Brief in Opposition is misdirected. Respondent argues that the Petition seeks to modify or reinterpret "the long standing totality of the circumstances test." (Brief in Opp. at 5). That is not an issue presented in the Petition.

Likewise, Respondent argues at length that the Court below and most other jurisdictions "apply the objective standard" or "the longstanding reasonable person test" to the *Miranda* custody determination and that Petitioner ignores this fact in seeking "to modify or more probably replace" those approaches (Brief in Opp. at 4; 15; 24-35; 40-41; 54). The Petitioner does not, however, challenge the objective nature of the analysis for the determination of custody.[9] Instead, the issue raised here is the proper frame of reference against which the objectively apparent facts are to be

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[9] To the contrary, Petitioner argued that the various incorrect approaches to custody, including that followed in Colorado, lead to inappropriate consideration of subjective matters in violation of the proper objective approach, and that this fault is demonstrated by the decision below (Pet. at 19-21).

examined and the proper goal toward which that analysis is to be directed.

CONCLUSION

The arguments in the Brief in Opposition confirm the existence of substantial confusion and error in the area of determining custody for purposes of *Miranda*. This Petition must be granted to correct the deviations of the Colorado Supreme Court and other courts from the doctrine which this Court has developed for the correct and limited application of *Miranda*, and thereby to provide much needed clarification and consistency for this important issue.

Respectfully Submitted,

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APPENDIX D

(Excerpts from the Petitioner's Argument from the Record)

People's Opening Brief at 16-17:

"Under *Miranda* and its progeny, however, to be 'deprived of his freedom in a *significant* way' one must have been placed in custody through restraints to a 'degree associated with formal arrest.' Without consistent recognition of this doctrinal basis established by the U.S. Supreme Court for the determination of whether there is a custodial interrogation, there is no constitutionally meaningful context for police, prosecutors, or trial court to consider the circumstances."

People's Opening Brief at 18:

"The common thread in these controlling federal decisions is that the requirements of *Miranda* only come into play when the authorities conduct their interrogation after placing restraints on the defendant which curtail his freedom of action to a degree associated with formal arrest."

People's Opening Brief at 21:

"When trial courts are so free to weigh the implications of circumstances to discover 'any significant restriction on freedom of movement,' without regard to the context of actual custody in which *Miranda* was based, police are given no guidance on when they must Mirandize a suspect, nor do prosecutors or judges have any guidance on when custody exists. *Miranda* and its progeny demonstrate that it is custody imposed through 'restraints on freedom of movement to a degree associated with formal arrest' which triggers the requirements of *Miranda*."

People's Reply Brief at 6-7:

"The analysis for determining whether an interrogation is custodial is fact specific, and must look to the totality of the circumstances on a case by case basis; however, the context for that analysis is the determination of whether the police have imposed 'significant restraints,' which means 'restraints on freedom of movement of the degree associated with formal arrest,' not whether the court can conceive of any lesser type of restraint from the circumstances.

People's Reply Brief at 7:

"It is possible ... for custody to arise without a formal arrest. However, the U.S. Supreme Court has in fact required formal arrest or restraints comparable to those associated with formal arrest for there to be custody. In this way it has given meaning to 'significant restraints' under *Miranda's* definition of custodial interrogation."

People's Supplemental Authorities at 1:

"The U.S. Supreme Court used restraints 'associated with formal arrest' in cases after *Miranda* to clarify the degree of restraints contemplated by the phrase 'deprived of freedom of action in any significant way' in *Miranda* itself."

People's Supplemental Authorities at 2:

"Restraints 'of the degree associated with formal arrest' are required for there to be custody in the absence of formal arrest. This demonstrates the high degree of police domination -- comparable to that effecting formal arrest -- which is necessary before there is a

significant enough restraint on one's freedom of action to trigger the advisement required under *Miranda's* definition of custodial interrogation."